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United Nations

Report of the International Law Commission

Sixty-fourth session
(7 May–1 June and 2 July–3 August 2012)

General Assembly
Official Records
Sixty-seventh session
Supplement No. 10 (A/67/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

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Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-fourth session from 7 May to 1 June 2012 and the second part from 2 July to 3 August 2012 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Maurice Kamto, Chairman of the sixty-third session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Lucius Caflisch (Switzerland)

Mr. Enrique J.A. Candioti (Argentina)

Mr. Pedro Comissário Afonso (Mozambique)

Mr. Abdelrazeg El-Murtadi Suleiman Gouider (Libya)

Ms. Concepción Escobar Hernández (Spain)

Mr. Mathias Forteau (France)

Mr. Kirill Gevorgian (Russian Federation)

Mr. Juan Manuel Gómez-Robledo (Mexico)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (People's Republic of China)

Ms. Marie G. Jacobsson (Sweden)

Mr. Maurice Kamto (Cameroon)

Mr. Kriangsak Kittichaisaree (Thailand)

Mr. Ahmed Laraba (Algeria)

Mr. Donald M. McRae (Canada)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Georg Nolte (Germany)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Stephen C. Vasciannie[1] (Jamaica)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Officers and the Enlarged Bureau

3. At its 3128th meeting, on 7 May 2012, the Commission elected the following officers:

Chairman: Mr. Lucius Caflisch (Switzerland)

First Vice-Chairman: Mr. Bernd H. Niehaus (Costa Rica)

Second Vice-Chairman: Mr. Hussein A. Hassouna (Egypt)

Chairman of the Drafting Committee: Mr. Mahmoud D. Hmoud (Jordan)

Rapporteur: Mr. Pavel Šturma (Czech Republic)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[2] and the Special Rapporteurs.[3]

5. The Commission set up a Planning Group composed of the following members: Mr. B. Niehaus (Chairman), Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. D.D. Tladi, Mr. E. Valencia-Ospina, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. P. Šturma (*ex officio*).

C. Drafting Committee

6. At its 3128th and 3141st meetings, on 7 May and 5 July 2012, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Expulsion of aliens*: Mr. M.D. Hmoud (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. E. Candioti, Mr. P. Comissário Afonso, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. J.M. Gómez-Robledo, Mr. H. Huang, Mr. K. Kittichaisaree, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. C.M. Peter, Mr. E. Petrič, Mr. G.V. Saboia, Mr.

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[1] By a letter dated 22 July 2012, addressed to the Chairman of the Commission, Mr. S.C. Vasciannie resigned from the Commission with immediate effect.

[2] Mr. E. Candioti, Mr. M. Kamto, Mr. E. Petrič and Mr. N. Wisnumurti.

[3] Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Mr. M. Kamto, Mr. E. Valencia-Ospina and Mr. M. Wood.

N. Singh, Mr. D.D. Tladi, Mr. E. Valencia-Ospina, Mr. A. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. P. Šturma (*ex officio*);

(b) *Protection of persons in the event of disasters*: Mr. M.D. Hmoud (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M. Forteau, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. P. Šturma (*ex officio*).

7. The Drafting Committee held a total of 17 meetings on the two topics indicated above.

D. Working Groups and Study Groups

8. At its 3131st meeting, on 18 May 2012, the Commission reconstituted the following Study Groups, which were open-ended:

(a) *Study Group on Treaties over time*: Mr. G. Nolte (Chairman);

(b) *Study Group on The most-Favoured-Nation clause*: Mr. D.M. McRae (Chairman).

9. At its 3132nd meeting on 22 May 2012, the Commission established the following open-ended Working Group:

Working Group on the Obligation to extradite or prosecute (aut dedere aut judicare): Mr. K. Kittichaisaree (Chairman).

10. The Planning Group reconstituted the following Working Group:

Working Group on the Long-term Programme of Work for the quinquennium: Mr. D.M. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar-Hernández, Mr. M. Forteau, Mr. K. Gevorgian, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. K. Kittichaisaree, Ms. M.G. Jacobsson, Mr. A. Laraba, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. C.M. Peter, Mr. E. Petrič, Mr. N. Singh, Mr. D.D. Tladi, Mr. E. Valencia-Ospina, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. P. Šturma (*ex officio*).

E. Secretariat

11. Ms. Patricia O'Brien, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director, served as Deputy Secretary. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Mr. Gionata Buzzini, Legal Officer, served as Assistant Secretary to the Commission.

F. Agenda

12. At its 3128th meeting, on 7 May 2012, the Commission adopted an agenda for its sixty-fourth session. The agenda, as modified in the light of the decisions taken by the

Commission at its 3132nd meeting on 22 May 2012,[4] consists of the following items:

1. Organization of the work of the session.
2. Expulsion of aliens.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Provisional application of treaties.
7. Formation and evidence of customary international law.
8. Treaties over time.
9. The Most-Favoured-Nation clause.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-fifth session.
12. Cooperation with other bodies.
13. Other business.

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[4] See below, chap. XII, sects. B and C.

Chapter II
Summary of the work of the Commission at its sixty-fourth session

13. Concerning the topic "**Expulsion of aliens**", the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the debate on the report of the International Law Commission that had taken place in the Sixth Committee at the sixty-sixth session of the General Assembly. The eighth report also contained a number of final observations by the Special Rapporteur, including on the form of the outcome of the Commission's work on the topic.

14. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 32 draft articles, together with commentaries thereto, on the expulsion of aliens. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014 (chap. IV).

15. In relation to the topic "**Protection of persons in the event of disasters**", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652), providing an elaboration on the duty to cooperate, as well as a consideration of the conditions for the provision of assistance, and of the termination of assistance. Following a debate in plenary, the Commission decided to refer draft articles A, 13 and 14, as proposed by the Special Rapporteur, to the Drafting Committee.

16. The Commission subsequently took note of five draft articles provisionally adopted by the Drafting Committee, relating to forms of cooperation, offers of assistance, conditions on the provision of external assistance, facilitation of external assistance and the termination of external assistance, respectively (A/CN.4/L.812) (chap. V).

17. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur. The Commission considered the preliminary report (A/CN.4/654) of the Special Rapporteur, which provided an overview of the work of the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly; addressed the issues to be considered during the present quinquennium, focusing in particular on the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*, the distinction and the relationship between the international responsibility of the State and the international responsibility of individuals and their implications for immunity, the scope of immunity *ratione personae* and immunity *ratione materiae*, and the procedural issues related to immunity; and gave an outline of the work plan. The debate revolved around, *inter alia*, the methodological and substantive issues highlighted by the Special Rapporteur in the preliminary report (chap. VI).

18. As regards the topic "**Provisional application of treaties**", the Commission decided to include it in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur. The Special Rapporteur presented to the Commission an oral report on the informal consultations that he had chaired with a view to initiating an informal dialogue with members of the Commission on a number of issues that could be relevant for the consideration of this topic. Aspects addressed in the informal consultations included, *inter alia*, the scope of the topic, the methodology, the possible outcome of the Commission's work as well as a number of substantive issues relating to the topic (chap. VII).

19. Concerning the topic "**Formation and evidence of customary international law**", the Commission decided to include it in its programme of work and appointed Mr. Michael Wood as Special Rapporteur. During the second part of the session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653), which aimed at stimulating an initial debate and which addressed the possible scope of the topic, terminological issues, questions of methodology as well as a number of specific points that could be dealt with in considering the topic. The debate revolved around, *inter alia*, the scope of the topic as well as the methodological and substantive issues highlighted by the Special Rapporteur in his Note (chap. VIII).

20. As regards the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**", the Commission established a Working Group to make a general assessment of the topic as a whole, focusing on questions concerning its viability and steps to be taken in moving forward, against the background of the debate on the topic in the Sixth Committee of the General Assembly. The Working Group requested its Chairman to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various perspectives in relation to the topic in light of the judgment of the International Court of Justice of 20 July 2012, any further developments, as well as comments made in the Working Group and the debate in the Sixth Committee (chap. IX).

21. As regards the topic "**Treaties over time**", the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and subsequent practice. The Study Group completed its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, by examining some remaining preliminary conclusions contained in that report. In the light of the discussions in the Study Group, the Chairman reformulated the text of six additional preliminary conclusions by the Chairman of the Study Group on the following issues: subsequent practice as reflecting a position regarding the interpretation of a treaty; specificity of subsequent practice; the degree of active participation in a practice and silence; effects of contradictory subsequent practice; subsequent agreement or practice and formal amendment or interpretation procedures; and subsequent practice and possible modification of a treaty. The Study Group also considered the third report by its Chairman on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings. Furthermore, the Study Group discussed the modalities of the Commission's work on the topic, and recommended that the Commission change the format of that work and appoint a Special Rapporteur.

22. At the present session, the Commission decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (chap. X).

23. Regarding the topic "**The Most-Favoured-Nation clause**", the Commission reconstituted the Study Group on the Most-Favoured-Nation clause, which continued to have a discussion concerning factors which appeared to influence investment tribunals in interpreting MFN clauses, on the basis, *inter alia*, of working papers concerning Interpretation and Application of MFN Clauses in Investment Agreements and the Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions. The Study Group also considered elements of the outline of its future report (chap. XI).

24. The specific issues on which comments by Governments would be of particular interest to the Commission in relation to topics that remain under its consideration are found in chapter III.

25. The Commission established a Planning Group to consider its programme, procedures and working methods (chap. XII, sect. E).

26. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, and the Inter-American Juridical Committee. The Commission had also an exchange of information with the African Union Commission on International Law. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (chap. XII, sect. G).

27. A training seminar was held with 24 participants of different nationalities (chap. XII, sect. J).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

A. Immunity of State officials from foreign criminal jurisdiction

28. With respect to the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission requests States to provide information on their national law and practice on the following questions:

(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?

B. Formation and evidence of customary international law

29. The Commission requests States to provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:

(a) Official statements before legislatures, courts and international organizations; and

(b) Decisions of national, regional and subregional courts.

Chapter IV
Expulsion of aliens

A. Introduction

30. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[5] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

31. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).[6]

32. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a memorandum by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007.[7]

33. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,[8] and draft articles 3 to 7.[9]

34. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594) and decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.[10] During the same session, the Commission approved the working group's conclusions and requested the Drafting Committee to take them into consideration in its work.[11]

35. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1). At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to

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[5] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid., Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and, at its fifty-second session (2000), it confirmed that decision (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

[6] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 242–274.

[7] *Ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[8] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401–402.

[9] *Ibid.*, footnotes 396–400.

[10] *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 170.

[11] *Ibid.*, para. 171.

restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.[12]

36. At its sixty-second session (2010), the Commission considered the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617), as well as the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1). It referred to the Drafting Committee revised draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled;[13] draft articles A and 9,[14] as contained in the sixth report of the Special Rapporteur (A/CN.4/625); draft articles B1 and C1,[15] as contained in the first addendum to the sixth report (A/CN.4/625/Add.1); and draft articles B and A1,[16] as revised by the Special Rapporteur during the sixty-second session.

37. At its sixty-third session (2011), the Commission considered the second addendum to the sixth report (A/CN.4/625/Add.2) and the seventh report (A/CN.4/642) of the Special Rapporteur. It also had before it comments received from Governments up to that point.[17] The Commission referred to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report;[18] draft article F1, also contained in that addendum and revised by the Special Rapporteur during the session;[19] and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session.[20] At its sixty-third session, the Commission also referred to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of the Special Rapporteur.[21] At the same session it took note of an interim report by the Chairman of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.[22]

B. Consideration of the topic at the present session

38. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which it considered at its 3129th meeting, on 8 May 2012.

39. The eighth report first provided a survey of the comments made by States and the European Union on the topic of expulsion of aliens during the debate on the report of the Commission in the Sixth Committee at the sixty-sixth session of the General Assembly; it then set out some final observations by the Special Rapporteur. In introducing his report, the Special Rapporteur said that, as he saw it, most of those comments were the result of the time lag between the progress the Commission had made in considering the topic and the submittal of information on that progress to the Sixth Committee during its consideration of

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[12] *Ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 91.

[13] *Ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), footnotes 1244–1251.

[14] *Ibid.*, footnotes 1255 and 1258.

[15] *Ibid.*, footnotes 1263–1264.

[16] *Ibid.*, footnotes 1260 and 1269.

[17] See A/CN.4/604 and A/CN.4/628 and Add.1.

[18] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), footnotes 531–532 and 535–538.

[19] *Ibid.*, footnote 534.

[20] *Ibid.*, footnote 540.

[21] A/CN.4/642, pp. 14–16.

[22] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 214.

the Commission's previous annual reports. The Special Rapporteur had attempted, then, to dispel the misunderstandings created by that time lag while taking into account, where necessary, certain suggestions or proposing certain adjustments to the wording of the draft articles. Since the draft articles had already been referred to the Drafting Committee by the Commission, it was in that context that those suggestions, largely of a drafting nature in any case, would be considered, as appropriate.

40. The eighth report also raised the question of the final form that the Commission's work on the topic would take, a question that had arisen during the debates in both the Commission and the Sixth Committee. In that regard, the Special Rapporteur remained convinced that there were few topics that lent themselves as well to codification as did expulsion of aliens. He hoped, therefore, that, when the time came, the Commission would transmit the results of its work on the topic of expulsion of aliens to the General Assembly in the form of draft articles, entrusting the Assembly with deciding what final form they should ultimately take.

41. At its 3134th and 3135th meetings, on 29 May 2012, the Commission considered the report of the Drafting Committee and, at its 3135th meeting, adopted on first reading a set of 32 draft articles on the expulsion of aliens (see sect. C.1 below).

42. At its 3152nd to 3155th meetings, on 30 and 31 July 2012, the Commission adopted the commentaries to the draft articles on the expulsion of aliens adopted on first reading (see sect. C.2 below).

43. At its 3155th meeting, on 31 July 2012, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

44. At its 3155th meeting, on 31 July 2012, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Maurice Kamto, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on expulsion of aliens.

C. Text of the draft articles on the expulsion of aliens adopted by the Commission on first reading

1. Text of the draft articles

45. The text of the draft articles adopted by the Commission on first reading at its sixty-fourth session is reproduced below.

Expulsion of aliens

Part One
General provisions

Article 1
Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Article 2
Use of terms

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Article 3
Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Article 4
Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Article 5
Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.

3. The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.

4. A State shall not expel an alien on a ground that is contrary to international law.

Part Two
Cases of prohibited expulsion

Article 6
Prohibition of the expulsion of refugees

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status, while such application is pending.

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been

convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 7
Prohibition of the expulsion of stateless persons

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Article 8
Other rules specific to the expulsion of refugees and stateless persons

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

Article 9
Deprivation of nationality for the sole purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Article 10
Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.

2. The collective expulsion of aliens, including migrant workers and members of their families, is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Article 11
Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

Article 12
Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Article 13
Prohibition of the resort to expulsion in order to circumvent an extradition procedure

A State shall not resort to expulsion in order to circumvent an ongoing extradition procedure.

Part Three
Protection of the rights of aliens subject to expulsion

Chapter I
General provisions

Article 14
Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Article 15
Obligation not to discriminate

1. The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. Such non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles.

Article 16
Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

Chapter II
Protection required in the expelling State

Article 17
Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

Article 18
Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

Article 19
Detention conditions of an alien subject to expulsion

1. (a) The detention of an alien subject to expulsion shall not be punitive in nature.

(b) An alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Article 20
Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of an alien subject to expulsion.

2. The expelling State shall not interfere with the exercise of the right to family life, except where provided by law and on the basis of a fair balance between the interests of the State and those of the alien in question.

Chapter III
Protection in relation to the State of destination

Article 21
Departure to the State of destination

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

Article 22
State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified

and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

Article 23
Obligation not to expel an alien to a State where his or her life or freedom would be threatened

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Article 24
Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Chapter IV
Protection in the transit State

Article 25
Protection in the transit State of the human rights of an alien subject to expulsion

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

Part Four
Specific procedural rules

Article 26
Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

Article 27
Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

Article 28
Procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

Part Five
Legal consequences of expulsion

Article 29
Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Article 30
Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Article 31
Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law entails the international responsibility of the expelling State.

Article 32
Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

2. Text of the draft articles and commentaries thereto

46. The text of the draft articles and commentaries thereto, adopted by the Commission on first reading at its sixty-fourth session, is reproduced below.

Expulsion of aliens

General commentary

(1) The present draft articles, dealing with the expulsion of aliens, are divided into five parts. Part One, entitled "General provisions", delimits the scope of the draft articles, defines the two key terms "expulsion" and "alien" for the purposes of the draft articles and then sets forth a few general rules relating to the right of expulsion, the requirement for conformity with law and the grounds for expulsion. Part Two of the draft articles deals with various cases of prohibited expulsion. Part Three addresses the question of protection of the rights of aliens subject to expulsion, first from a general standpoint (chapter I), then by dealing more specifically with the protection required in the expelling State (chapter II), protection in relation to the State of destination (chapter III) and protection in the transit State (chapter IV). Part Four of the draft articles concerns specific procedural rules, while Part Five sets out the legal consequences of expulsion.

(2) The formulation "alien[s] subject to expulsion" used throughout the draft articles is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process. That process generally begins when a procedure is instituted that could lead to the adoption of an expulsion decision, in some cases followed by a judicial phase; it ends, in principle, with the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision. In other words, the formulation covers the situation of the alien not only in relation to the expulsion decision adopted in his or her regard but also in relation to the various stages of the expulsion process that precede or follow the adoption of the decision and may in some cases involve the taking of restrictive measures against the alien, including possible detention for the purpose of expulsion.

Part One
General provisions

Article 1
Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Commentary

(1) The purpose of draft article 1 is to delimit the scope of the draft articles. While paragraph 1 defines the scope in general terms, paragraph 2 excludes certain categories of individuals who would otherwise be covered by virtue of paragraph 1.

(2) In stating that the draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory, paragraph 1 defines the scope of the draft articles both *ratione materiae* and *ratione personae*. With regard to scope *ratione materiae*, which relates to the measures covered by the draft articles, reference is made simply to the "expulsion by a State", without further elaboration, since "expulsion" is defined in draft article 2, subparagraph (a), below. With regard to scope *ratione personae*, that is, the persons covered by the draft articles, it follows from paragraph 1 that the draft articles

apply to the expulsion of aliens present in the territory of the expelling State, whether their presence there is lawful or unlawful. The term "*alien*" is defined in draft article 2, subparagraph (b). The category of aliens unlawfully present in the territory of the expelling State covers both aliens who have entered the territory unlawfully and aliens whose presence in the territory has subsequently become unlawful, primarily because of a violation of the laws of the expelling State governing conditions of stay.[23]

(3) Since the inception of the Commission's work on the topic "Expulsion of aliens", Commission members have generally been of the view that the draft articles should cover both aliens lawfully present and those unlawfully present in the territory of the expelling State. Paragraph 1 of the draft article clearly reflects that position. However, it should be noted at the outset that some provisions of the draft articles do draw distinctions between the two categories of aliens, particularly with respect to the rights to which they are entitled.[24] It should be also be noted that the inclusion within the scope of the draft articles of aliens whose presence in the territory of the expelling State is unlawful is to be understood in conjunction with the phrase in article 2, subparagraph (a), *in fine*, which excludes from the scope of the draft articles questions concerning non-admission of an alien to the territory of a State.[25] The view was expressed, however, that these draft articles should only address aliens lawfully present in the territory of the expelling State, given that the restrictions on expulsion contained in relevant global and regional treaties are limited to such aliens.[26]

(4) Paragraph 2 of draft article 1 excludes from the scope of the draft articles certain categories of aliens, namely, aliens enjoying privileges and immunities under international law. The purpose of the provision is to exclude aliens whose enforced departure from the territory of a State is governed by special rules of international law, such as diplomats, consular officials, staff members of international organizations and other officials or military personnel on mission in the territory of a foreign State, including, as appropriate, members of their families. In other words, such aliens are excluded from the scope of the draft articles because of the existence of special rules of international law governing the conditions under which they can be compelled to leave the territory of the State in which they are posted for the exercise of their functions and exempting them from the normal expulsion procedure.[27]

(5) On the other hand, some other categories of aliens who enjoy special protection under international law, such as refugees, stateless persons and migrant workers and their family members,[28] are not excluded from the scope of the draft articles. It is understood,

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[23] On these questions, see the Special Rapporteur's second report (A/CN.4/573), paras. 50–56.

[24] See below draft articles 6–7, 26–27 and 29 and the commentary thereto.

[25] See below para. (5) of the commentary to draft article 2.

[26] Convention relating to the Status of Refugees (Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150), art. 32; International Covenant on Civil and Political Rights (New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171), art. 13; European Convention on Establishment (Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141), art. 3; American Convention on Human Rights (Pact of San José) (San José, Costa Rica, 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 143), art. 22, para. 6; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217), art. 12, para. 4; and Arab Charter on Human Rights (adopted at the Summit of the League of Arab States at its sixteenth regular session, Tunis, May 2004), art. 26.

[27] The rules of international law concerning the presence and departure of these categories of aliens are briefly set out in the memorandum by the Secretariat on expulsion of aliens (A/CN.4/565), paras. 28–35.

[28] For an analysis of the legal rules that provide additional protection to certain categories of aliens, see the above-cited memorandum by the Secretariat (A/CN.4/565), chap. X, in particular paras. 756–891.

however, that the application of the provisions of the draft articles to those categories of aliens is without prejudice to the application of the special rules that may govern one aspect or another of their expulsion from the territory of a State.[29] Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly,[30] are also not excluded from the scope of the draft articles.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Commentary

(1) Draft article 2 defines two key terms, "expulsion" and "alien", for the purposes of the present draft articles.

(2) Subparagraph (a) provides a definition of "expulsion". The definition reflects the distinction between, on the one hand, a formal act by which a State compels an alien to leave its territory (regardless of what that act may be called under internal law) and, on the other hand, conduct attributable to that State which produces the same result.[31] The Commission thought it appropriate to include both types of cases in the definition of "expulsion" for purposes of the draft articles. It should also be clarified that draft article 2 merely provides a definition of "expulsion" and does not prejudge in any way the question of the lawfulness of the various means of expulsion to which it refers. Means of expulsion that do not take the form of a formal act are included in the definition of expulsion within the meaning of the draft articles but fall under the regime of prohibition of "disguised expulsion" set out in draft article 11. In other words, conduct attributable to a State that produces the same result as a formal expulsion decision is defined as expulsion, but it constitutes a prohibited form of expulsion because it is disguised and thus does not allow the alien concerned to enjoy the rights associated with an expulsion done on the basis of a formal act.

(3) The proviso that the formal act or conduct constituting expulsion must be attributable to the State is to be understood in the light of the criteria of attribution to be found in Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts.[32]

For a discussion of the various categories of aliens, see also the Special Rapporteur's second report (A/CN.4/573), paras. 45–122.

[29] In this sense, see the "without prejudice" clause concerning refugees and stateless persons contained in draft article 8.

[30] See, e.g., General Assembly resolution 59/170 of 20 December 2004, para. 10; see also the Special Rapporteur's second report (A/CN.4/573), para. 72, and the above-cited memorandum by the secretariat (A/CN.4/565), paras. 160–162.

[31] On the distinction between expulsion as a formal act and expulsion as conduct, see the Special Rapporteur's second report (A/CN.4/573), paras. 188–192.

[32] See *Yearbook ... 2001*, vol. II (Part Two), pp. 38–54.

(4) Conduct — other than the adoption of a formal decision — that could result in expulsion may take the form of either actions or omissions on the part of the State. Omission might in particular consist of tolerance towards conduct directed against the alien by individuals or private entities; such would be the case, for example, if the State failed to protect an alien from hostile acts emanating from non-State actors.[33] What appears to be the determining element in the definition of expulsion is that, as a result of either a formal act or conduct — active or passive — attributable to the State, the alien in question is *compelled* to leave the territory of that State.[34] In addition, in order to conclude that there has been expulsion as a result of *conduct* (that is, without the adoption of a formal decision), it is essential to establish that it was the intention of the State in question, by means of that conduct, to bring about the departure of the alien from its territory.[35]

(5) For the sake of clarity, the Commission thought it useful to specify, in the second clause of subparagraph (a), that the concept of expulsion within the meaning of the draft articles did not cover extradition of an alien to another State, transfer to an international criminal court or tribunal or the non-admission of an alien, other than a refugee, to a State. With respect to non-admission, it should be explained that the exclusion relates to the refusal by the authorities of a State — usually the authorities responsible for immigration and border control — to allow an alien to enter the territory of that State. On the other hand, the measures taken by a State to compel an alien already present in its territory, even if unlawfully present, to leave it are covered by the concept of "expulsion" as defined in draft article 2, subparagraph (a).[36] This distinction should be understood in the light of the definition of the scope *ratione personae* of the draft articles, which, as draft article 1, paragraph 1, expressly states, includes both aliens lawfully present in the territory of the expelling State and those unlawfully present. Moreover, as draft article 2, subparagraph (a), expressly indicates, the exclusion of matters relating to non-admission from the scope of the draft articles does not apply to refugees. That reservation is explained by draft article 6, paragraph 3, which sets forth the prohibition against return (*refoulement*) within the meaning of article 33 of the Convention on the Status of Refugees of 28 July 1951[37] and hence inevitably touches on questions of admission.

(6) Draft article 2, subparagraph (b), defines an "alien" as an individual who does not have the nationality of the State in whose territory the individual is present. The definition covers both individuals with the nationality of another State and individuals without the nationality of any State, that is, stateless persons.[38] Based on that definition, it follows that an individual who has the nationality of the State in whose territory the individual is present cannot be considered an alien with regard to that State, even if he or she possesses one or more other nationalities, and even if it happens that one of those other nationalities can be considered predominant, in terms of an effective link, *vis-à-vis* the nationality of the State in whose territory the individual is present.

(7) The definition of "alien" for the purposes of the draft articles is without prejudice to the right of a State to accord certain categories of aliens special rights with respect to

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[33] See below, draft article 11 and the commentary thereto.

[34] With regard to the notion of constraint in this context, see the Special Rapporteur's second report (A/CN.4/573), para. 193.

[35] See below paras. (3) to (7) of the commentary to draft article 11.

[36] On the distinction between "expulsion" and "non-admission", see the Special Rapporteur's second report (A/CN.4/573), paras. 171–173, and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 74–78.

[37] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150.

[38] With regard to stateless persons, see draft article 7 below.

expulsion by allowing them, under its internal law, to enjoy in that regard a regime similar to or the same as that enjoyed by its nationals.[39] Nonetheless, any individual who does not have the nationality of the State in whose territory that individual is present should be considered an alien for purposes of the draft articles, and his or her expulsion from that territory is subject to the present draft articles.

Article 3
Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Commentary

(1) The first sentence of draft article 3 sets out the right of a State to expel an alien from its territory. That right is uncontested in practice as well as in case law and the legal writings.[40] The right to expel has been recognized in particular in a number of arbitral awards and decisions of claims commissions[41] and in various decisions of regional courts and commissions.[42] Moreover, it is enshrined in the internal law of most States.[43]

(2) The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles and by other applicable rules of international law. The specific mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion, an importance also underlined by the many provisions of the draft articles devoted to various aspects of the protection of

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[39] On these questions see the Special Rapporteur's second report (A/CN.4/573), paras. 124–152.

[40] On the uncontested nature of the right of expulsion, see the Special Rapporteur's third report (A/CN.4/581), paras. 1–23, and the discussion in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 185–200.

[41] See, for example, *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348; the *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 731; the *Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528, 529, 531 and 532; the *Oliva* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 608 (Ralston, Umpire); the *Paquet* case, Mixed Claims Commission Belgium-Venezuela, 1903, *United Nations, Reports of International Arbitral Awards*, vol. IX, p. 325 (Filtz, Umpire); and *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92–113.

[42] With respect to the European Court of Human Rights, see in particular *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 43. See also *Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87 and 13448/87, para. 102; *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 73; *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94, para. 38; *Bouchelkia v. France*, Judgment (Merits), 29 January 1997, Application No. 23078/93, para. 48; and *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 33. With regard to the African Commission on Human and Peoples' Rights, see in particular communication No. 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal et Association Malienne des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

[43] On this point see the above-cited memorandum by the Secretariat (A/CN.4/565), para. 192.

the human rights of aliens subject to expulsion. Among the "other applicable rules of international law" to which a State's exercise of its right to expel aliens is subject and which are not addressed in specific provisions of the draft articles, it is worth mentioning in particular some of the "traditional" limitations that derive from the rules governing the treatment of aliens, including the prohibitions against arbitrariness, abuse of rights and denial of justice.[44] Other applicable rules also include rules in human rights instruments concerning derogation in times of emergency.

Article 4
Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Commentary

(1) Draft article 4 sets out a fundamental condition to which a State's exercise of its right to expel aliens from its territory is subject. That condition is the adoption of an expulsion decision by the expelling State in accordance with the law.

(2) The requirement that an expulsion decision must be made has, first of all, the effect of prohibiting a State from engaging in conduct intended to compel an alien to leave its territory without notifying the alien of a formal decision in that regard. Such conduct would, in fact, fall under the prohibition of any form of disguised expulsion contained in draft article 11, paragraph 1.

(3) The requirement of conformity with the law is, first and foremost, a logical conclusion, since expulsion is supposed to be exercised within the framework of law.[45] It is thus not surprising to note the wide agreement in the legislation of many States on the minimum requirement that the expulsion procedure must conform to the provisions of law.[46] Moreover, the requirement is well established in international human rights law, both universal and regional. At the universal level, it appears in article 13 of the International Covenant on Civil and Political Rights[47] (with respect to aliens lawfully present on the territory of the expelling State); in article 22, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;[48] in article 32, paragraph 2, of the Convention relating to the Status of Refugees;[49] and in article

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[44] *Ibid.*, paras. 201–298.

[45] See in this regard the points made by the Special Rapporteur in the addendum to his sixth report on expulsion of aliens (A/CN.4/625/Add.1), para. 55.

[46] *Ibid.*, para. 61.

[47] The provision reads as follows: "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ..." (International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171).

[48] The provision reads as follows: "Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law" (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3).

[49] The provision states, in particular, that the expulsion of a refugee lawfully in the territory of a Contracting State "shall only be in pursuance of a decision reached in accordance with due process of law ..." (Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150).

31, paragraph 2, of the Convention relating to the Status of Stateless Persons.[50] At the regional level, it is relevant to mention article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;[51] article 22, paragraph 6, of the American Convention on Human Rights (Pact of San José);[52] article 1, paragraph 1, of Protocol No. 7 to the European Convention on Human Rights;[53] and article 26, paragraph 2, of the Arab Charter on Human Rights;[54] all these laid down the same requirement with respect to aliens lawfully present in the territory of the expelling State.

(4) The Commission is of the view that the requirement for conformity with law shall apply to any expulsion decision, irrespective of whether the presence of the alien in question in the territory of the expelling State is lawful or not. It is understood, however, that domestic legislation may provide for different rules and procedures for expulsion depending on the lawful or unlawful nature of that presence.[55]

(5) The requirement for conformity with law is quite general, since it applies to both the procedural and the substantive conditions for expulsion.[56] In consequence, its scope is wider than the similar requirement set out in draft article 5, paragraph 2, with regard to the grounds for expulsion.

(6) In its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice confirmed the requirement for conformity with law as a condition for the lawfulness of an expulsion from the standpoint of international law. Referring, in that context, to article 13 of the International Covenant on Civil and Political Rights and to article 12, paragraph 4, of the African Charter on Human and Peoples' Rights, the Court observed:

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[50] This provision has essentially the same wording, *mutatis mutandis*, as the provision quoted in the preceding footnote concerning refugees (Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117).

[51] The provision reads as follows: "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law" (African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217).

[52] The provision reads as follows: "An alien lawfully in the territory of a State party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law" (American Convention on Human Rights (Pact of San José), San José, Costa Rica, 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 143).

[53] The provision reads as follows: "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law ..." (Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117).

[54] The provision reads as follows: "No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law ..." (Charter adopted by the Summit of the League of Arab States at its sixteenth regular session (Tunis, May 2004); entered into force on 15 March 2008; translation from the Office of the United Nations High Commissioner for Human Rights; English version available at http://www.unicef.org/tdad/arabcharterhumanrights.doc).

[55] In this sense, see draft article 26, para. 4, below.

[56] See, in that sense, the opinion of the Steering Committee for Human Rights of the Council of Europe when it states, in connection with article 1, paragraph 1, of Protocol 7 to the European Convention on Human Rights, that expulsion decisions must be taken "by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules" (Council of Europe, Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 11).

> "It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with 'the law', in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law."[57]

(7) Although the requirement for conformity with law is a condition for the lawfulness of any expulsion measure under international law, the question might arise as to the extent of an international body's power of review of compliance with internal law rules in a context like that of expulsion. An international body is likely to be somewhat reticent in that regard. As an example, one might mention the position taken by the Human Rights Committee with respect to the expulsion by Sweden in 1977 of a Greek political refugee suspected of being a potential terrorist. That individual argued before the Committee that the expulsion decision had not been taken "in accordance with law" and therefore was not in compliance with the provisions of article 13 of the Covenant. The Human Rights Committee took the view that the interpretation of internal law was essentially a matter for the courts and authorities of the State party concerned, and that "it was not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question [had] interpreted and applied the internal law correctly in the case before it …, unless it [was] established that they [had] not interpreted and applied it in good faith or that it [was] evident that there [had] been an abuse of power".[58] The International Court of Justice and the European Court of Human Rights took a similar approach to their own power to assess whether a State had complied with its internal law in a case of expulsion.[59]

Article 5
Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.

2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.

3. The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.

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[57] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 65. With reference to the procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the Court concluded that the expulsion of Mr. Diallo had not been decided "in accordance with law" (para. 73).

[58] Human Rights Committee, communication No. 58/1979 *Anna Maroufidou v. Sweden*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), p. 165, para. 10.1.

[59] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, para. 58: "Where the Convention refers directly back to domestic law, as in article 5, compliance with such law is an integral part of Contracting States 'engagements' and the Court is accordingly competent to satisfy itself of such compliance where relevant (article 19); the scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia* and *mutatis mutandis*, the Winterwerp judgment of 24 October 1979, Series A, No. 33, p. 10, § 46)."

4. A State shall not expel an alien on a ground that is contrary to international law.

Commentary

(1) The question of the grounds for expulsion encompasses a number of aspects having to do with statement of the ground for expulsion, existence of a valid ground and assessment of that ground by the competent authorities. Draft article 5 deals with those issues.

(2) Draft article 5, paragraph 1, sets out an essential condition under international law, namely, the statement of the ground for the expulsion decision. The duty of the expelling State to indicate the grounds for an expulsion appears to be well-established in international law.[60] As early as 1892, the Institute of International Law was of the view that an act ordering expulsion must "*être motivé en fait et en droit*" [be reasoned in fact and in law].[61] In its judgment in the *Diallo* case, the International Court of Justice found that the Democratic Republic of the Congo had failed to fulfil this obligation to give reasons and that, throughout the proceedings, it had failed to adduce grounds that might provide "a convincing basis" for Mr. Diallo's expulsion; the Court therefore concluded that the arrest and detention of Mr. Diallo with a view to his expulsion had been arbitrary. In that regard, the Court could not but

> "find not only that the decree itself was not reasoned in a sufficiently precise way ... but that throughout the proceedings, the Democratic Republic of the Congo has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. ... Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter".[62]

In the *Amnesty International v. Zambia* case, the African Commission on Human and Peoples' Rights held that Zambia had violated the right of the alien concerned to receive information by failing to inform him of the reasons for his expulsion. According to the Commission, the fact "that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9 (1))".[63]

(3) Draft article 5, paragraph 2, sets out the fundamental requirement that the ground for expulsion must be provided for by law. The reference to "law" here is to be understood as a reference to the internal law of the expelling State. In other words, international law makes the lawfulness of an expulsion decision dependent on the condition that the decision is based on a ground provided for in the law of the expelling State. The Commission considers that this requirement is implied by the general requirement of conformity with law, set forth in draft article 4.[64] The express mention, in this context, of national security and public order is justified by the inclusion of these grounds for expulsion in the

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[60] See, in this sense, the Special Rapporteur's sixth report (A/CN.4/625), para. 73. See also, more generally, the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 309–318.

[61] *Règles internationals sur l'admission et l'expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], adopted on 9 September 1892 at the Geneva session of the Institute of International Law, art. 30.

[62] Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 81.

[63] African Commission on Human and Peoples' Rights, Communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999, paras. 32 and 33.

[64] See above, para. (5) of the commentary to draft article 4.

legislation of many States and the frequency with which they are invoked to justify an expulsion.[65] However, the Commission is of the view that public order and national security are not the only grounds for expulsion permitted under international law; the words "including, in particular" preceding the mention of those two grounds is intended to underline that point. For example, violation of internal law on entry and stay (immigration law) constitutes a ground for expulsion in the legislation of many States and, in the Commission's view, is a permissible ground under international law; in other words, the unlawfulness of the presence of an alien in the territory of a State can in itself constitute a sufficient ground for expulsion. That being the case, it would be futile to search international law for a list of valid grounds of expulsion that would apply to aliens in general;[66] it is for the internal law of each State to provide for and define the grounds for expulsion, subject to the reservation stated in paragraph 4 of the draft article, namely, that the grounds must not be contrary to international law. In this regard, the Commission notes that internal laws provide for a rather wide variety of grounds for expulsion.[67]

(4) Paragraph 3 sets out general criteria for the expelling State's assessment of the ground for expulsion. The assessment shall be made in good faith and reasonably, taking into account the gravity of the facts and in the light of all the circumstances. The conduct of the alien in question and the current nature of the threat to which the facts give rise are mentioned as among the factors to be taken into consideration by the expelling State. The criterion of "the current nature of the threat" mentioned *in fine* is particularly relevant when the ground for expulsion is a threat to national security or public order.

(5) The purpose of draft article 5, paragraph 4, is simply to recall the prohibition against expelling an alien on a ground contrary to international law. The prohibition would apply, for example, to expulsion based on a ground that was discriminatory in the sense of draft article 15, paragraph 1, below.[68]

Part Two
Cases of prohibited expulsion

Article 6
Prohibition of the expulsion of refugees

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status, while such application is pending.

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[65] For an analysis of the content of these two grounds of expulsion and the criteria for assessing them, see the Special Rapporteur's sixth report (A/CN.4/625), paras. 78–118, and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 340–376.

[66] See below, however, draft article 6, para. 1, and draft article 7, which limit the grounds for expulsion of refugees and stateless persons to "grounds of national security or public order", thus reproducing the rules contained in the relevant treaty instruments.

[67] For a survey of grounds for expulsion, see the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 325–422, and the Special Rapporteur's sixth report (A/CN.4/625), paras. 73–209.

[68] On the lawfulness of grounds for expulsion under international law, see the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 320–324. In this context, mention is made of the prohibition of racial discrimination (paras. 322 and 425–429) and reprisals (para. 416).

See also draft article 12 (Prohibition of expulsion for purposes of confiscation of assets) and draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure), below.

> 3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Commentary

(1) Draft article 6 deals with the expulsion of refugees, which is subject to restrictive conditions by virtue of the relevant rules of international law.

(2) The term "refugee" should be understood not only in the light of the general definition contained in article 1 of the Convention relating to the Status of Refugees of 28 July 1951,[69] as amended by article 1 of the Protocol relating to the Status of Refugees of 31 January 1967,[70] which eliminated the geographic and temporal limitations of the 1951 definition, but also having regard to subsequent developments in the matter.[71] In that regard, the broader definition of "refugee" adopted in the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 merits particular mention.[72]

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[69] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, art. 1.

[70] Protocol relating to the Status of Refugees, New York, 31 January 1967, United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267, art. 1.

[71] On this matter see in particular the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 146–159, and the Special Rapporteur's second report (A/CN.4/573), paras. 57–61.

[72] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45. Article 1 of the Convention reads as follows:

> "*Article 1 – Definition of the term 'refugee'*
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> 1. For the purposes of this Convention, the term 'Refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
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> 2. The term 'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
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> 3. In the case of a person who has several nationalities, the term 'a country of which he is a national' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
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> 4. This Convention shall cease to apply to any refugee if:
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> (a) [illegible] has voluntarily re-availed himself of the protection of the country of his nationality, or
>
> (b) having lost his nationality, he has voluntarily re-acquired it, or

(3) Draft article 6, paragraph 1, reproduces the wording of article 32, paragraph 1, of the Convention relating to the Status of Refugees of 28 July 1951. The rule contained in that paragraph, which applies only to refugees lawfully in the territory of the expelling State, limits the grounds for expulsion of such refugees to those relating to reasons of national security or public order.

(4) Draft article 6, paragraph 2, which has no equivalent in the 1951 Convention, aims at extending the protection recognized in paragraph 1 to a refugee who is unlawfully present in the territory of the receiving State but who has applied for recognition of refugee status. As the last clause of paragraph 2 indicates, that protection can be envisaged only for so long as the application is pending. The protection provided for in paragraph 2, which reflects a trend in the legal literature and finds support in the practice of some States,[73] would constitute a departure from the principle whereby the unlawfulness of the presence of an alien in the territory of a State can in itself justify expulsion of the alien. The Commission debated whether it should set aside the additional protection provided for in paragraph 2 in cases where the manifest intent of the application for refugee status was to thwart an expulsion decision likely to be handed down against the individual concerned. After intense debate, it concluded that it was not necessary to provide for such an exception, since paragraph 2 concerned only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of "refugee" within the meaning of the 1951 Convention or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law. A majority of the Commission members considered that in such a case it should not matter what motives had inspired the individual to apply for recognition of his or her refugee status or whether the application was specifically intended to prevent expulsion. On the other hand, any individual who does not correspond to the definition of refugee within the meaning of the

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(c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or

(d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or

(e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or

(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or

(g) he has seriously infringed the purposes and objectives of this Convention.

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee,

(c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity,

(d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

6. For the purposes of this Convention, the Contracting State of asylum shall determine whether an applicant is a refugee."

[73] On this issue see the Special Rapporteur's third report (A/CN.4/581), paras. 69–74.

relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in paragraph 1, including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. From that standpoint, paragraph 2 should be interpreted as being without prejudice to the right of a State to expel, for reasons other than those mentioned in draft article 6, an alien whose application for refugee status is manifestly abusive.

(5) Draft article 6, paragraph 3, which deals with the obligation of *non-refoulement*, combines paragraphs 1 and 2 of article 33 of the 1951 Convention. Unlike the other provisions of the draft articles, which do not cover the situation of non-admission of an alien to the territory of a State,[74] draft article 6, paragraph 3, does cover that situation as well, as indicated by the opening phrase: "A State shall not expel or return (*refouler*) …". Moreover, unlike the protection stipulated in paragraph 1, the protection provided for in paragraph 3 applies to all refugees, regardless of whether their presence in the receiving State is lawful or unlawful. It should also be emphasized that the mention of this specific obligation of *non-refoulement* of refugees is without prejudice to the application to them of the general rules prohibiting expulsion to certain States as contained in draft articles 23 and 24.

(6) Other matters relating to expulsion of refugees, including the elements mentioned in article 32, paragraphs 2 and 3, of the 1951 Convention relating to the Status of Refugees, are covered by the "without prejudice" clause contained in draft article 8.[75]

Article 7
Prohibition of the expulsion of stateless persons

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Commentary

(1) As is the case for refugees, stateless persons are protected under the relevant rules of international law by a favourable regime that places limits on their expulsion. Article 1 of the Convention relating to the Status of Stateless Persons of 28 September 1954,[76] defines the term "stateless person" as "a person who is not considered as a national by any State under the operation of its law".[77]

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[74] See above draft article 2, subpara. (a), *in fine*.

[75] See the explanations given in the commentary to draft article 8 below.

[76] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117.

[77] This provision reads as follows:

"*Article 1 – Definition of the term stateless person*

1. For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

(2) By analogy with paragraph 1 of draft article 6 concerning refugees, draft article 7 is patterned after article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons. Here, too, the limitation on the grounds for expulsion applies only to stateless persons lawfully present in the territory of the expelling State.

(3) Draft article 7 does not contain a parallel provision to paragraph 3 of draft article 6 concerning refugees, which refers to the obligation of *non-refoulement*. Stateless persons, like any other alien subject to expulsion, are entitled to the protection recognized by draft articles 23 and 24 below, which apply to aliens in general.

(4) As it did with refugees,[78] the Commission preferred not to address in draft article 7 other matters relating to the expulsion of stateless persons, which are covered by the "without prejudice" clause contained in draft article 8.[79]

Article 8
Other rules specific to the expulsion of refugees and stateless persons

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

Commentary

(1) Draft article 8 is a "without prejudice" clause designed to ensure the application of other rules concerning the expulsion of refugees and stateless persons provided for by law but not mentioned in draft articles 6 and 7.

(2) The term "law" as used in draft article 8 is to be understood as referring to the other relevant rules of international law applicable to refugees and stateless persons, as well as to any relevant rule of the expelling State's internal law, provided that it is not incompatible with that State's obligations under international law.

(3) This "without prejudice" clause applies in particular to the rules concerning procedural requirements for the expulsion of a refugee or a stateless person, which are set forth, respectively, in article 32, paragraph 2, of the 1951 Convention[80] and in article 31,

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(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

Regarding the definition of the term "stateless person", see also the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 173–175, as well as the Special Rapporteur's second report (A/CN.4/573), paras. 100–104.

[78] See para. (6) of the commentary to draft article 6 above.

[79] See the explanations provided in the commentary to draft article 8 below.

[80] The provision reads as follows: "The expulsion of such a refugee [that is, a refugee lawfully present in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

paragraph 2, of the 1954 Convention.[81] It also applies to the provisions of article 32, paragraph 3, of the 1951 Convention[82] and article 31, paragraph 3, of the 1954 Convention,[83] which require the expelling State to allow a refugee or a stateless person a reasonable period within which to seek legal admission into another country, and also reserve the right of the expelling State to apply, during that period, such internal measures as it may deem necessary.

Article 9
Deprivation of nationality for the sole purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Commentary

(1) Draft article 9 addresses the specific situation in which a State might deprive a national of his or her nationality, and thus makes that national an alien, for the sole purpose of expelling him or her. The Commission is of the view that such a deprivation of nationality, insofar as it has no other justification than the State's desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.[84] For this reason, the Commission decided to set forth in draft article 9 the prohibition of the deprivation of nationality for the sole purpose of expulsion.[85]

(2) It would no doubt have been simpler to state, for example "A State may not deprive a national of his or her nationality for the sole purpose of expulsion." However, the Commission preferred the current wording because the phrase "shall not make its national an alien, by deprivation of nationality", in addition to linking the specific situation covered in the draft article to the topic of the expulsion of aliens, is expository in nature: it describes

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[81] The provision reads as follows: "The expulsion of such a stateless person [that is, a stateless person lawfully present in the territory of the expelling State] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

[82] The provision reads as follows: "The Contracting States shall allow such a refugee [that is, 'a refugee lawfully in their territory'] a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

[83] The provision reads as follows: "The Contracting States shall allow such a stateless person [that is, 'a stateless person lawfully in their territory'] a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

[84] General Assembly resolution 217 (III) A of 10 December 1948. Article 15 of the Universal Declaration of Human Rights reads as follows: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." See also art. 20, para. 3, of the American Convention on Human Rights ("No one shall be arbitrarily deprived of his nationality or of the right to change it."), as well as art. 29, para. 1, of the Arab Charter on Human Rights ("Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.")

[85] For a more general discussion of expulsion in the event of loss or deprivation of nationality, see the analysis provided in the Special Rapporteur's fourth report (A/CN.4/594), paras. 30–35, as well as the treatment of this issue in the above-cited memorandum by the Secretariat (A/CN.4/595), paras. 892–916.

how a national of a State may become an alien in that State by means of deprivation of his or her nationality when the sole aim of that State is to expel the person concerned.

(3) It should be clarified, however, that draft article 9 does not purport to limit the normal operation of legislation relating to the grant or loss of nationality; consequently, it should not be interpreted as affecting a State's right to deprive an individual of its nationality on a ground that is provided for in its legislation.

(4) Furthermore, draft article 9 does not address the issue of the expulsion by a State of its own nationals, which the Commission regarded as falling outside the scope of the draft articles, which deal solely with the expulsion of aliens.[86]

Article 10
Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.

2. The collective expulsion of aliens, including migrant workers and members of their families, is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Commentary

(1) Paragraph 1 of draft article 10 contains a definition of collective expulsion for the purposes of the draft articles. According to this definition, collective expulsion is understood to mean the expulsion of aliens "as a group". Only the "collective" aspect is addressed in this definition, which must be understood in the light of the general definition of expulsion contained in draft article 2, subparagraph (a).

(2) Paragraph 2 sets out the prohibition of the collective expulsion of aliens, including migrant workers and members of their families. The Commission could not fail to include in the draft articles a prohibition that is expressly embodied in several international human rights treaties.[87] At the universal level, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families expressly prohibits the collective expulsion of these persons, providing, in article 22, paragraph 1, that "[m]igrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually." At the regional level, the American Convention on Human Rights provides in article 22, paragraph 9, that "[t]he collective expulsion of aliens is prohibited". Article 4 of Protocol No. 4 to the European Convention on Human Rights[88] stipulates that "[c]ollective expulsion of aliens is

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[86] On the subject of the expulsion of nationals, see the Special Rapporteur's third report (A/CN.4/581), paras. 28–57, as well as the Special Rapporteur's fourth report (A/CN.4/594), paras. 4–24, which relates more specifically to the situation of dual and multiple nationals.

[87] For an analysis of the subject of collective expulsion, see the Special Rapporteur's third report (A/CN.4/581), paras. 97–135, and the above-cited memorandum by the Secretariat (A/CN.4/565 and Corr.1), paras. 984–1020.

[88] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which recognizes certain rights and freedoms other than those already included in the Convention and

prohibited". Similarly, article 12, paragraph 5, of the African Charter on Human and Peoples' Rights provides that "[t]he mass expulsion of non-nationals shall be prohibited" and in the same provision defines this form of expulsion as "that which is aimed at national, racial, ethnic or religious groups". Lastly, in article 26, paragraph 2, *in fine*, the Arab Charter on Human Rights states that "[c]ollective expulsion is prohibited under all circumstances".

(3) Article 13 of the International Covenant on Civil and Political Rights does not expressly prohibit collective expulsion. However, the Human Rights Committee expressed the opinion that such a form of expulsion would be contrary to the procedural guarantees to which aliens subject to expulsion are entitled. In its general comment No. 15 on the position of aliens under the Covenant, the Committee stated the following:

> "Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions. *On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.* This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of article 13."[89] (emphasis added)

(4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions on the basis of which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. The criterion adopted for this purpose is the *reasonable and objective examination of the particular case* of each member of the group. This criterion is informed by the case law of the European Court of Human Rights.[90] It is a

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in the first Protocol to the Convention, as amended by Protocol No. 11, Strasbourg, 16 September 1963, *European Treaty Series*, No. 46.

[89] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10.

[90] See *Vedran Andric v. Sweden*, Decision as to the admissibility of Application No. 45917/99, 23 February 1999, para. 1: "The Court finds that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis ..." See also *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 59: "The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see *Andric*, cited above). That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been

criterion that the Special Rapporteur on the rights of non-citizens, of the Commission on Human Rights, Mr. David Weissbrodt, had also endorsed in his final report of 2003.[91]

(5) Paragraph 4 of draft article 10 contains a "without prejudice" clause referring to situations of armed conflict. Some members of the Commission are of the view that the prohibition of collective expulsion applies even in times of armed conflict and that possible exceptions to such a prohibition could be contemplated only in respect of aliens who are nationals of a State engaged in an armed conflict with the State in whose territory they are present — not to other aliens present in the territory of that State — and only if they are engaged as a group in activities that endanger the security of the State. According to a different view expressed in the Commission, under current international law a State would generally have the right to expel collectively the nationals of another State with which it is engaged in an armed conflict. Furthermore, the point had been made that the issue of the expulsion of aliens in times of armed conflict was very complex and that the Commission should not elaborate rules that might not be entirely compatible with those of international humanitarian law. In the light of those difficulties, the Commission eventually opted for the inclusion, in the draft article on the prohibition of collective expulsion, of a "without prejudice" clause, formulated broadly so as to cover any rules of international law that might be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.[92]

Article 11
Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

Commentary

(1) Draft article 11 is intended to indicate that a State does not have the right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a formal expulsion decision, namely to compel an

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compliance with Article 4 of Protocol No. 4;" and para. 63: "In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account."

[91] In it, the Special Rapporteur states the following: "Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group." The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283 (E/CN.4/Sub.2/2003/23), 26 May 2003, para. 11 (citing the European Court of Human Rights, *Čonka v. Belgium*, *op. cit.*).

[92] For an analysis of the rules applicable, in times of armed conflict, to the expulsion of aliens who are nationals of an enemy State, see the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 93–106, 915–956 and 1020. See also the discussion of the subject in the following reports by the Special Rapporteur: second report (A/CN.4/573), paras. 112–115; third report (A/CN.4/581), paras. 116–134; and sixth report (A/CN.4/625), paras. 19–28.

alien to depart from its territory.[93] In the legal literature in English,[94] the term "constructive expulsion" is sometimes used to designate methods of expulsion other than the adoption of a formal decision as such. The Commission considered, however, that it was difficult to find a satisfactory equivalent of the term "constructive expulsion" in other languages, particularly French, as the term might carry an undesirable positive connotation. Consequently, the Commission opted in this context for the term "disguised expulsion".

(2) Paragraph 1 of draft article 11 sets out the prohibition of any form of disguised expulsion, thus expressing the Commission's conviction that such conduct is prohibited under international law regardless of the form it takes or the methods employed. This is because, in essence, disguised expulsion infringes the human rights of the alien in question, including the procedural rights referred to in Part Four of the draft articles.

(3) Draft article 11, paragraph 2, contains a definition of disguised expulsion that focuses on what characterizes it. The specificity lies in the fact that the expelling State, without adopting a formal expulsion decision, engages in conduct intended to produce and actually producing the same result, namely the forcible departure of an alien from its territory. The element of *détournement* is conveyed by the adverb "indirectly" that qualifies the occurrence of an alien's departure as a result of the conduct of the State. The last phrase of paragraph 2 is intended to indicate that the notion of "disguised expulsion" covers only situations in which the forcible departure of an alien is the *intentional result* of actions or omissions attributable to the State. The State's intention to provoke an alien's departure from its territory, which is inherent in the definition of expulsion in general, thus remains a decisive factor when expulsion occurs in a disguised form.

(4) The definition of disguised expulsion, based on the elements of "compulsion" and "intention", appears consistent with the criteria applied in this regard by the Iran-United States Claims Tribunal, which had before it a number of claims relating to situations of the same nature as those envisaged in draft article 11. The two essential elements of the notion of "disguised expulsion" that emerge from the relevant decisions of the Tribunal have been summarized as follows:

> "Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility."[95]

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[93] On the notion of "disguised expulsion", see the Special Rapporteur's sixth report (A/CN.4/625), paras. 29–43. See also the discussion of the notion of "constructive expulsion" in the above-cited memorandum by the Secretariat, paras. 68–73.

[94] See, *inter alia*, Ruth L. Cove, "State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals", *Fordham International Law Journal*, vol. 11, 1987–1988, pp. 802–838.

[95] David John Harris, *Cases and Materials on International Law*, 4th ed. (London, Sweet & Maxwell, 1991), p. 2 (commenting on the Iran-United States Claims Tribunal cases relating to disguised expulsion). Concerning this case law, see also Giorgio Gaja "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 283–314, particularly pp. 289–290, which refer to the following decisions of the Tribunal: *Short v. Islamic Republic of Iran*, Award of 14 July 1987, *Iran-United States Claims Tribunal Reports*, vol. 16 (1987-III), pp. 85–86; *International Technical Products Corporation v. Islamic Republic of Iran*, Award of 19 August 1985, *Iran-United States Claims Tribunal Reports*, vol. 9 (1985-II), p. 18; and *Rankin v. Islamic Republic of Iran*, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17 (1987-IV), pp. 147–148. See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London/New York, Routledge, 1997), p. 262; John R. Crook, "Applicable Law in International Arbitration: The Iran-U.S. Claims

(5) The approach taken by the Eritrea-Ethiopia Claims Commission seems to follow the same lines. The Commission considered the claim of Ethiopia that Eritrea was responsible for "indirect" or "constructive" expulsions of Ethiopians that were contrary to international law. The Commission rejected certain claims after finding that the Ethiopians in question had not been expelled by the Government of Eritrea or made to leave by Government policy; instead, they had left the country for other reasons, such as economic factors or upheavals brought about by war, for which Eritrea could not be held responsible. The Commission noted that free consent seemed to have prevailed in these situations.

> "91. Ethiopia contended that Eritrea was internationally responsible for the damages suffered by every Ethiopian who left Eritrea during the period covered by its claims, including those not expelled by direct government action. Many departures were claimed to be 'indirect' or 'constructive' expulsions resulting from unlawful Eritrean Government actions and policies causing hostile social and economic conditions aimed at Ethiopians. Ethiopia also contended that the physical conditions of departures often were unnecessarily harsh and dangerous. Eritrea denied that it was legally responsible for the Ethiopians' departures, contending that they reflected individual choices freely made by the persons concerned.
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> 92. The great majority of Ethiopians who left Eritrea did so after May 2000; claims regarding the conditions of their departures are analyzed below. As to those who departed earlier, the evidence indicates that an initial wave of 20,000 to 25,000 departures in 1998 largely resulted from economic factors. Many were port workers, most from Assab, unemployed after Eritrean ports stopped handling cargo to and from Ethiopia. A 1999 Amnesty International report in the record estimated that the closing of Assab port cost 30,000 jobs; Amnesty reported that none of the returnees it interviewed in Ethiopia during this period said that he or she had been expelled. A few thousand more Ethiopians left Eritrea during 1999; the evidence indicates that these too were mostly economically motivated. A second Amnesty report cited more than 3,000 Ethiopians who returned to Ethiopia in early 1999 due to unemployment, homelessness or reasons related to the war. Amnesty felt these did not appear to have been expelled by the Eritrean Government or due to government policy. The December 2001 UNICEF/WAT Study in Ethiopia's evidence also highlights the economic motivation of departures during this period.
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> 93. The Commission appreciates that there was a spectrum of 'voluntariness' in Ethiopian departures from Eritrea in 1999 and early 2000. Ethiopian declarants described growing economic difficulties, family separations, harassment and sporadic discrimination and even attacks at the hands of Eritrean civilians. However, the Commission is also struck that only about 70 declarations and claim forms specifically described leaving in 1998 and 1999, and of these, fewer than 20 declarants seemed to consider themselves 'expelled or deported'.
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> 94. The Commission concludes from the evidence that departures of Ethiopians before May 2000 in very large measure resulted from economic or other causes, many reflecting economic and social dislocation due to the war, for which the Government of Eritrea was not legally responsible.
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> 95. The evidence suggests that the trip back to Ethiopia or to other destinations for those who elected to depart during this period could be harsh, particularly for those who left Assab to return to Ethiopia across the desert. However, the evidence

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Tribunal Experience", *American Journal of International Law*, vol. 83, 1989, pp. 278–311 at pp. 308 and 309; and R. Cove, *op. cit.* (footnote 94 above) pp. 802–838.

> does not establish that this was the result of actions or omissions by Eritrea for which it is responsible. Accordingly, Ethiopia's claims in this respect are dismissed."[96]

In considering subsequent expulsions, the Eritrea-Ethiopia Claims Commission emphasized the high legal threshold for responsibility based on the jurisprudence of the Iran-United States Claims Tribunal. The Commission concluded that Ethiopia had failed to meet the high legal threshold for proof of such claims as follows:

> "126. Ethiopia also contended that those who left between May 2000 and December 2000 were victims of unlawful indirect or constructive expulsion. The Parties expressed broadly similar understanding of the law bearing on these claims. Both cited the jurisprudence of the Iran-U.S. Claims Tribunal, which establishes a high threshold for liability for constructive expulsion. That Tribunal's constructive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government. Finally, the government's actions must have been taken with the intention of causing the aliens to depart.
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> 127. The evidence does not meet these tests. Post-war Eritrea was a difficult economic environment for Ethiopians and Eritreans both, but the Eritrean Government did not intentionally create generalized economic adversity in order to drive away Ethiopians. The Commission notes that the Government of Eritrea took actions in the summer of 2000 that were detrimental to many Ethiopians' economic interests and that there was anti-Ethiopian public opinion and harassment. Nevertheless, many Ethiopians in Eritrea evidently saw alternatives to departure and elected to remain or to defer their departures. Given the totality of the record, the Commission concludes that the claim of wide-scale constructive expulsion does not meet the high legal threshold for proof of such a claim."[97]

(6) The Commission considered whether among the acts of a State that might constitute disguised expulsion within the meaning of draft article 11 it should also include support or tolerance shown by the State towards acts committed individually or collectively by private persons.[98] Some members of the Committee were of the view that it would be problematic

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[96] Partial Award, Civilians Claims, Ethiopia's Claim 5, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91–95 (citation omitted), United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 277–278.

[97] *Ibid*., pp. 285–286 [citing Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal*, pp. 343–365 (1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 464–471 (1996)].

[98] The International Law Association answered that question in the affirmative in its Declaration of Principles of International Law on Mass Expulsion. As noted in the above-cited memorandum by the Secretariat (A/CN.4/565), para. 72, the definition of the term "expulsion" contained in the Declaration also covers situations in which the forcible departure of individuals is achieved by means other than a formal decision by the authorities of the State. It encompasses situations in which a State aids, abets or tolerates acts committed by its citizens with the intention of provoking the departure of individuals from the territory of the State. According to the Declaration,

> "'expulsion' in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion;
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> … 'a failure to act' may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons

to include that kind of situation in the definition of disguised expulsion. However, the Commission considered that support or tolerance shown by a State towards acts committed by private persons could fall within the scope of the prohibition of disguised expulsion if such support or tolerance constituted "actions or omissions of the State ... with the intention of provoking the departure of aliens from its territory". In other words, such support or tolerance on the part of the expelling State must be assessed according to the criterion of the specific intention to which the last phrase of paragraph 2 refers. It is understood that a particularly high threshold should be set for this purpose when it is a matter of mere tolerance unaccompanied by definite actions of support on the part of the State for the acts of private persons.

(7) The Commission considers that the situation of support or tolerance towards acts of private persons could involve acts committed by either nationals of the State in question or aliens present in the territory of that State. That is what is meant by the phrase "its nationals or other persons", which, moreover, covers both natural and legal persons.

Article 12
Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Commentary

(1) Draft article 12 sets out the prohibition of confiscatory expulsions, that is, expulsions with the aim of unlawfully depriving an alien of his or her assets.[99] The unlawful confiscation of property may well be the undeclared aim of an expulsion. "For example, the 'right' of expulsion may be exercised ... in order to expropriate the alien's property ... In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purposes."[100] The Commission considers that such expulsions, to which some States have resorted in the past,[101] are unlawful from the perspective of contemporary international law. Aside from the fact that the grounds for such expulsions appear unsound,[102] it must be said that they are incompatible with the fundamental principle set out in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, which states: "No alien shall be arbitrarily deprived of his or her lawfully acquired assets."[103]

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out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return".

International Law Association, Declaration of Principles of International Law on Mass Expulsion, 62nd Conference of the International Law Association, Seoul, 24–30 August 1986, *Conference Report 1986*, p. 13.

[99] See, in this regard, the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 119–124. See also the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 444 and 479–481.

[100] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978), p. 209.

[101] For some examples, see the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 119–124.

[102] See Goodwin-Gill, *op. cit.* (footnote 100 above), pp. 216–217 and 307–308.

[103] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex, art. 9.

(2) In addition, an expulsion for the sole purpose of confiscation of the assets of the alien in question implicates the right to property as recognized in various human rights treaties.[104]

Article 13
Prohibition of the resort to expulsion in order to circumvent an extradition procedure

A State shall not resort to expulsion in order to circumvent an ongoing extradition procedure.

Commentary

(1) Draft article 13 sets out in general terms the prohibition against resorting to expulsion in order to circumvent an extradition procedure.[105] One could speak of "disguised extradition" in this context.[106] As the wording of draft article 13 clearly indicates, the prohibition in question applies only as long as the extradition procedure is ongoing, in other words, from the moment at which the State in the territory of which the alien is present receives from another State a request for extradition in respect of the alien until a definitive decision is taken and enforced by the competent authorities of the first State on the request for extradition.

(2) The Commission considered whether the content of draft article 13 should be made more specific by stating, for example, that when a State requested a person's extradition, the person could not be expelled either to the requesting State or to a third State with an interest in extraditing the person to the requesting State as long as the extradition process had not been completed, except for reasons of national security or public order.[107] While

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[104] See, in this regard, draft article 30 below concerning the protection of the property of an alien subject to expulsion.

[105] More generally on the issue of expulsion in connection with extradition, see the Special Rapporteur's sixth report (A/CN.4/625), paras. 44 to 72. See also the above-cited memorandum of the Secretariat (A/CN.4/565), paras. 430–443.

[106] See European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, especially the Court's conclusion in paragraph 60 of its judgment: "Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant's deprivation of liberty in the night of 26 to 27 October 1975 was neither 'lawful', within the meaning of article 5 § 1 (f) (art. 5-1-f), nor compatible with the 'right to security of person'." Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to 'detention' necessary in the ordinary course of 'action ... taken with a view to deportation'. The findings of the presiding judge of the Paris tribunal de grande instance — even if obiter — and of the Limoges Administrative Court, even if that court had only to determine the lawfulness of the order of 17 September 1979, are of the utmost importance in the Court's view; they illustrate the vigilance displayed by the French courts. There has accordingly been a breach of article 5 § 1 (art. 5–1) of the Convention."

[107] The draft article on this issue originally proposed by the Special Rapporteur in his sixth report (A/CN.4/625, para. 72) read as follows:

> "Draft article 8: Prohibition of extradition disguised as expulsion
>
> Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request."

At the sixty-second session of the Commission in 2010 the Special Rapporteur proposed a revised version of that draft article (A/65/10, footnote 1268), which read as follows:

some members were in favour of such wording, others considered that it would be better if the draft article focused on the element of circumvention without setting out in absolute terms a prohibition against expelling the alien in question throughout the entire extradition procedure. The point was also made in that context that reasons other than national security, such as a breach of immigration law, could in some cases justify the expulsion of an alien subject to a request for extradition without necessarily leading to the conclusion that the expulsion was intended to *circumvent* an extradition procedure.

Part Three
Protection of the rights of aliens subject to expulsion

Chapter I
General provisions

Article 14

Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Commentary

(1) Draft article 14, paragraph 1, sets out the obligation of the expelling State to treat all aliens subject to expulsion with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. The wording of this paragraph is taken from article 10 of the International Covenant on Civil and Political Rights, which deals with the situation of persons deprived of their liberty. The addition *in fine* of the phrase "at all stages of the expulsion process" is intended to underline the general nature of the obligation in question, which covers all stages of the process that can lead to the adoption of an expulsion decision and its implementation, including, in some cases, the imposition of restrictive or custodial measures.

(2) Divergent views were expressed by members of the Commission as to whether human dignity was a specific human right in addition to being the foundation or source of inspiration for human rights in general. The Commission deemed it appropriate to set out in draft article 14 the general principle of respect for the dignity of any alien subject to expulsion, also taking into account the fact that aliens were not infrequently subjected to humiliating treatment in the course of the expulsion process that was offensive to their dignity as human beings, without necessarily amounting to cruel, inhuman or degrading treatment.[108]

"Draft article 8: Expulsion in connection with extradition

Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article]."

[108] Concerning respect for the dignity of all aliens subject to expulsion, see the Special Rapporteur's fifth report (A/CN.4/611), paras. 68–72.

(3) The phrase "the inherent dignity of the human person", drawn from article 10 of the International Covenant on Civil and Political Rights, is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent in every human being, as opposed to a subjective notion of dignity, which might depend on the preferences or sensitivity of a particular person or vary according to cultural factors.

(4) Draft article 14, paragraph 2, simply recalls that all aliens subject to expulsion are entitled to respect for their human rights.[109] The word "including", which precedes the reference to the rights mentioned in the draft articles, is intended to make it clear that the specific mention of some rights in the draft articles is justified only because of their particular relevance in the context of expulsion; their mention should not be understood as implying in any way that respect for those rights is more important than respect for other human rights not mentioned in the draft articles. It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law. That said, mention should be made in particular in this context of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985.[110]

Article 15
Obligation not to discriminate

1. The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. Such non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles.

Commentary

(1) Draft article 15 concerns the obligation not to discriminate in the context of the expulsion of aliens.[111] The obligation not to discriminate is set out, in varying formulations, in the major universal and regional human rights instruments.[112] This obligation has also been recognized in case law concerning expulsion. It was for example, stated in general terms by the Iran-United States Claims Tribunal in the *Rankin* case:

> "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[113]

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[109] Concerning the impact of human rights on the exercise of the right of expulsion, see the Special Rapporteur's fifth report (A/CN.4/611) and the discussion in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 251–295 and 444–448.

[110] General Assembly resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, annex.

[111] See, in this regard, the Special Rapporteur's fifth report (A/CN.4/611), paras. 148–156, and the discussion in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 256–286 and 482–487.

[112] See, in this regard, the Special Rapporteur's fifth report (A/CN.4/611), paras. 149–151.

[113] *Rankin v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, p. 142, para. 22.

Also noteworthy is the *Mauritian women* case, in which the Human Rights Committee considered that there had been a violation of the International Covenant on Civil and Political Rights because the law in question introduced discrimination on the ground of sex by protecting the wives of Mauritian men against expulsion while not affording such protection to the husbands of Mauritian women.[114]

The European Court of Human Rights took the same position that the Human Rights Committee had taken in the aforementioned *Mauritian women* case in its judgment of 28 May 1985 in the *Abdulaziz, Cabales and Balkandali* case.[115] The Court held unanimously that article 14 of the European Convention on Human Rights had been violated by reason of discrimination against each of the applicants on the ground of sex: unlike male immigrants settled in the United Kingdom, the applicants did not have the right, in the same situation, to obtain permission for their non-national spouses to enter or remain in the country for settlement. After having stated that "advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe", the Court held that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention".[116] It also emphasized that article 14 was concerned with the "avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways".[117] On the other hand, it held that in the current case, the fact that applicable rules affected "fewer white people than others" was not a sufficient reason to consider them as racist in character as they "did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin".[118]

(2) Draft article 15, paragraph 1, sets out the prohibition of discrimination in the exercise by a State of its right to expel aliens. As the prohibition of discrimination applies to the exercise of the right of expulsion, it covers both the decision to expel or not to expel and the procedures relating to the adoption of an expulsion decision and its possible implementation. Moreover, the general scope of the obligation not to discriminate is confirmed by the content of paragraph 2 of the draft article, which indicates that the non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including the rights mentioned in the present draft articles.

(3) The list of prohibited grounds for discrimination contained in draft article 15 is based on the list included in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of "ethnic origin" and a reference to "any other ground impermissible under international law". In the view of the Commission, the express mention of "ethnic origin" in the draft article is justified because of the undisputed nature of the prohibition in contemporary international law of discrimination on this ground and in view of the particular relevance of ethnic issues in the context of the expulsion of aliens. The reference to "any other ground impermissible under international

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[114] Communication No. R 9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), pp. 139–142, para. 9.2.

[115] European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94; relevant parts of the judgment are recalled by Marc Bossuyt in his commentary on article 14 in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme. Commentaire article par article* (Paris, Economica, 1999), pp. 482–483.

[116] *Ibid*., para. 78.

[117] *Ibid*., para. 82.

[118] *Ibid*., para. 85.

law" clearly indicates the non-exhaustive nature of the list of prohibited grounds for discrimination included in draft article 15.

(4) Whereas some Commission members proposed to expand the list of grounds for discrimination to include sexual orientation and/or belonging to a minority, other members were opposed. It was noted in particular that an express reference to certain additional grounds might be interpreted as an implicit exclusion of other grounds.

(5) Some Commission members were of the view that the prohibition of any discrimination on the ground of sexual orientation was already established under positive international law or that there was at the very least a trend in that direction in international practice and case law[119] that would justify as a matter of progressive development the inclusion of sexual orientation among the prohibited grounds for discrimination. Other Commission members considered that the issue remained controversial and that the prohibition of discrimination on the ground of sexual orientation was not universally recognized, particularly in view of the practice of a number of States that punished, sometimes quite severely, homosexual behaviour, and the absence of the mention of such a ground for discrimination in the texts of universal and regional instruments for the protection of human rights. In any case, insofar as, according to the interpretation by the Human Rights Committee of the reference to "sex" in articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights, the notion includes sexual orientation,[120] some members were of the view that it was not necessary to mention sexual orientation as a distinct ground among the discriminatory grounds based on sex, as this would be likely to lead to confusion or redundancy.

(6) The need to recognize possible exceptions to the obligation not to discriminate based on nationality was mentioned by some members of the Commission. They referred in that regard to associations of States such as the European Union, which are characterized by the establishment of a regime of freedom of movement by their citizens.

(7) On reflection, the Commission considered that the reference in the draft article to "any other ground impermissible under international law" took sufficient account of those various concerns. On the one hand, the formulation adopted makes it possible to capture any legal development concerning prohibited grounds for discrimination that might have occurred since the adoption of the Covenant. On the other hand, it also preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.

Article 16
Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

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[119] In particular, the Human Rights Committee considered that the reference to "sex" in arts. 2, para. 1, and 26 of the International Covenant on Civil and Political Rights must be understood to include sexual orientation; communication No. 488/1992, *Nicholas Toonen v. Australia*, Views adopted on 31 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. II, p. 235, para. 8.7. For the case law of the European Court of Human Rights, see, *inter alia*, *Salgueiro Da Silva Mouta v. Portugal*, Judgment of 21 December 1999, Application No. 33290/96, para. 28, and *E.B. v. France*, Judgment of 22 February 2008, Application No. 43546/02, para. 50.

[120] See previous footnote.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

Commentary

(1) Draft article 16 sets out the particular requirements concerning the expulsion of vulnerable persons such as children, older persons, persons with disabilities and pregnant women.

(2) Draft article 16, paragraph 1, is general in scope. It sets out the obligation of the expelling State to treat and protect vulnerable persons who are subject to expulsion with due regard for their vulnerabilities and special needs. By first setting out the requirement that the individuals in question "shall be considered as such", the Commission wished to indicate the importance of due recognition by the expelling State of their vulnerabilities, as it is that recognition that would justify granting these individuals special treatment and protection.

(3) The Commission considers that it is hardly possible to list in a draft article all categories of vulnerable persons that might merit special protection in the context of an expulsion procedure. Aside from the categories of persons explicitly mentioned, there might be other individuals, such as those suffering from incurable diseases or an illness requiring particular care which, *ex hypothesi*, could not be provided — or would be difficult to provide — in the possible State or States of destination. The addition of the phrase "and other vulnerable persons" clearly indicates that the list included in paragraph 1 is not exhaustive.

(4) Draft article 16, paragraph 2, deals with the specific case of children and faithfully reproduces the wording of article 3, paragraph 1, of the Convention on the Rights of the Child.[121] While not excluding consideration of other relevant factors, paragraph 2 sets out the requirement that the best interests of the child shall be a primary consideration in all decisions concerning children who are subject to expulsion.[122]

Chapter II
Protection required in the expelling State

Article 17
Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

Commentary

Draft article 17 recalls the obligation of the expelling State to protect the right to life of an alien subject to expulsion.[123] This right, which is "inherent" in "every human being" according to article 6, paragraph 1, of the International Covenant on Civil and Political Rights, is proclaimed, admittedly in various ways, in core international instruments for the protection of human rights, both universal[124] and regional.[125]

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[121] Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3. Article 3 reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[122] See the discussion in the Special Rapporteur's fifth report (A/CN.4/611), paras. 121–127, and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 468–474.

[123] See the discussion of this question in the Special Rapporteur's fifth report (A/CN.4/611), paras. 53–67.

Article 18
Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

Commentary

(1) Draft article 18 recalls, in the context of expulsion, the general prohibition of torture or cruel, inhuman or degrading treatment or punishment.[126] This is an obligation enshrined in various treaty instruments for the protection of human rights, both universal and regional.[127] The obligation not to subject aliens to torture or cruel, inhuman or degrading treatment is also set forth in General Assembly resolution 40/144.[128] In its judgment of 20 November 2010 in the *Ahmadou Sadio Diallo* case, the International Court of Justice recalled in connection with an expulsion case that the prohibition of inhuman or degrading treatment derives from a rule of general international law.[129]

(2) Draft article 18 concerns only the obligation of the expelling State itself not to subject an alien to torture or cruel, inhuman or degrading treatment or punishment. On the other hand, the obligation not to expel an alien to a State where there are substantial grounds for believing that he or she risks being subjected to such treatment is set out in draft article 24 below.

(3) On reflection, the Commission preferred not to tackle in the draft articles the question of the extent to which the prohibition of torture or cruel, inhuman or degrading treatment or punishment also covers cases in which such treatment is inflicted, not by *de jure* or *de facto* State organs but by persons or groups acting in a private capacity. It considered that it would be better to leave that issue to the relevant monitoring bodies to assess or, where appropriate, to the courts that might be called upon to rule on the exact extent of the obligations arising from one instrument or another for the protection of human rights.[130]

Article 19
Detention conditions of an alien subject to expulsion

1. (a) The detention of an alien subject to expulsion shall not be punitive in nature.

(b) An alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty.

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[124] See in particular article 3 of the 1948 Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights.

[125] See article 2 of the European Convention on Human Rights; article 2 of the Charter of Fundamental Rights of the European Union; article 3 of the American Convention on Human Rights; article 4 of the African Charter on Human and Peoples' Rights; and article 5 of the Arab Charter on Human Rights.

[126] See, in this regard, the Special Rapporteur's fifth report (A/CN.4/611), paras. 73–120.

[127] *Ibid*., para. 73.

[128] General Assembly resolution 40/144 of 13 December 1985, annex, art. 6.

[129] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 87.

[130] See, in this regard, the points made in para. (4) of the commentary to article 24 below.

2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Commentary

(1) Draft article 19, paragraph 1, sets out the non-punitive nature of detention to which aliens facing expulsion may be subject.[131] Subparagraph (a) establishes the general principle that such detention must not be punitive in nature whereas subparagraph (b) sets out one of the consequences of that principle. Subparagraph (b) provides that, save in exceptional circumstances, an alien who is detained in the course of an expulsion procedure must be held separately from persons sentenced to penalties involving deprivation of liberty. Such a safeguard is granted to accused persons, in their capacity as unconvicted persons, under article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights. The Commission considers that, in view of the non-punitive nature of detention for the purpose of expulsion, there is all the more reason to provide the safeguard set out in article 10, paragraph 2, of the Covenant to aliens subjected to that form of detention. This view seems to be in harmony with the position expressed by the Human Rights Committee in its comments on article 13 of the Covenant in relation to expulsion. The Committee noted that if expulsion procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (articles 9[132] and 10[133]) may also be applicable.[134] The same requirement is set out

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[131] See, in this regard, Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 43: "Administrative detention should never be punitive in nature."

[132] Article 9 of the Covenant provides: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[133] Article 10 of the Covenant provides: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

in principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in the annex to General Assembly resolution 43/173 of 9 December 1988. This principle, which also covers detention for the purpose of expulsion, stipulates: "Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons."

(2) The reference to "exceptional circumstances" that could justify non-compliance with the rule set out in paragraph 1 (b) is drawn from article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights.

(3) In the view of the Commission, the rule set out in paragraph 1 (b) does not necessarily require the expelling State to put in place facilities specially set aside for the detention of aliens with a view to their expulsion; the detention of aliens could occur in a facility in which persons sentenced to custodial penalties are also detained, provided, however, that the aliens in question are placed in a separate section of the facility.

(4) It should be clarified that the safeguards mentioned above apply only to detention for the purpose of ensuring the implementation of an expulsion decision; they are without prejudice to the case of aliens subject to expulsion who have been convicted of a criminal offence, including those situations in which the expulsion of an alien might be ordered as an additional measure or as an alternative to prison.

(5) The important issue of the length of detention, which poses difficult problems in practice,[135] is the subject of draft article 19, paragraph 2, which comprises two subparagraphs. Subparagraph (a) is general in scope and sets out the principle that the detention of an alien with a view to his or her expulsion is subject to time limits. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out and cannot be of excessive duration.[136] Such requirements are confirmed in international case law, the legislation of various States[137] and a significant number of judicial findings of national courts.[138] The words "reasonably necessary" that appear in the second sentence of paragraph 2 (a) are intended to provide administrative authorities and, if

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[134] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 9.

[135] See, in this regard, the discussion in the Special Rapporteur's sixth report (A/CN.4/625), paras. 262–273.

[136] The prohibition of excessive duration of detention was affirmed by the European Court of Human Rights with respect to article 5 of the European Convention on Human Rights; see in particular *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 113: "The Court recalls, however, that any deprivation of liberty under art. 5, para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under art. 5, para. 1 (f) ... It is thus necessary to determine whether the duration of the deportation proceedings was excessive."

See also: Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 35 ("Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite") and para. 75 (g) ([the recommendation of] "[e]nsuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite").

[137] See, in this regard, the Special Rapporteur's sixth report (A/CN.4/625), paras. 249–250 and 262–270. See also the above-cited memorandum of the Secretariat (A/CN.4/565), paras. 726–727.

[138] See the many references in the Special Rapporteur's sixth report (A/CN.4/625), paras. 252–261, and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 728–737.

necessary, a judicial authority with a standard to assess the necessity and the duration of the detention of an alien for the purpose of expulsion.

(6) Paragraph 2 (b) states that the extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power. Despite the doubts expressed by some members concerning the applicability of such a requirement in the context of the implementation of immigration rules, the Commission considered it necessary to retain the requirement in order to prevent possible abuses by the administrative authorities with respect to the length of the detention of an alien subject to expulsion. The content of paragraph 2 (b) is inspired by the case law of the European Court of Human Rights.[139]

(7) Draft article 19, paragraph 3, is inspired by a recommendation put forward by the Special Rapporteur on the human rights of migrants.[140] Paragraph 3 (a) sets out the requirement of regular review of the detention of an alien for the purpose of expulsion on the basis of specific criteria established by law. According to paragraph 3 (a), it is detention as such, as opposed to the initial decision concerning placement in detention, that should be subject to regular review. While some Commission members considered that the safeguards set out in paragraph 3 (a) were of the nature of *lex ferenda*, others considered that they derived from principles of contemporary human rights law. It was also emphasized that such safeguards flowed from the non-punitive nature of the detention of aliens for the purpose of expulsion.

(8) Paragraph 3 (b) sets out the principle that detention in connection with expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned. While the principle was not contested in the Commission, the exception to it gave rise to lively debate. Some members thought that as soon as the enforcement of an expulsion decision became impossible, the reason for the detention vanished and an end must be put to the detention. Other members were of the view that an explicit exception should be made for cases in which the reasons for such an impossibility were attributable to the alien in question. The Commission opted in the end for recognizing such an exception, while indicating clearly in an introductory phrase in paragraph 3 (b) that the entire paragraph should be understood in the light of paragraph 2. This means, in particular, that under paragraph 2 (a), even in the event that the impossibility of carrying out an expulsion decision is attributable to the alien in question, the alien cannot be kept in detention for an excessive length of time.

Article 20
Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of an alien subject to expulsion.

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[139] See in particular *Shamsa v. Poland*, Judgment of 27 November 2003, Applications Nos. 45355/99 and 45357/99, para. 59. The Court referred to "the right of habeas corpus" contained in art. 5, para. 4, of the Convention to "support the idea that detention extended beyond the initial period as envisaged in paragraph 3 calls for the intervention of a court as a guarantee against arbitrariness".

[140] Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62 (E/CN.4/2003/85), 30 December 2002, para. 75 (g). This recommendation states:

> "(g) … The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant."

2. The expelling State shall not interfere with the exercise of the right to family life, except where provided by law and on the basis of a fair balance between the interests of the State and those of the alien in question.

Commentary

(1) Draft article 20 establishes the obligation of the expelling State to respect the right to family life of an alien subject to expulsion. The Commission considers it necessary to mention this right explicitly in the draft articles because of the particular relevance that it assumes in the context of the expulsion of aliens.[141] By the mere fact of compelling an alien to leave the territory of a State, expulsion may undermine the unity of the alien's family in the event that, for various reasons, family members are not able to follow the alien to the State of destination. It is not surprising, therefore, that the legislation and case law of various States recognize the need to take into account family considerations as a limiting factor in the expulsion of aliens.[142]

(2) The right to family life is enshrined both in universal instruments and in regional conventions for the protection of human rights. At the universal level, article 17 of the International Covenant on Civil and Political Rights states:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, *family*, home or correspondence, nor to unlawful attacks on his honour and reputation. (emphasis added)
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, under the terms of article 5, paragraph 1 (b), of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, aliens enjoy "the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence".[143]

(3) At the regional level, article 8, paragraph 1, of the European Convention on Human Rights provides that "[e]veryone has the right to respect for his private and family life ...". Article 7 of the Charter of Fundamental Rights of the European Union reproduces this provision *in extenso*. Under section III (c) of the Protocol to the European Convention on Establishment,[144] the contracting States, in exercising their right of expulsion, must in particular pay due regard to family ties and the period of residence in their territory of the person concerned. While the African Charter on Human and Peoples' Rights does not contain this right, in other respects it is deeply committed to the protection of the family (see article 18). Article 11, paragraph 2, of the American Convention on Human Rights establishes this right in the same terms as the above-cited article 17 of the International Covenant on Civil and Political Rights. Article 21 of the Arab Charter on Human Rights also sets out the right.

(4) The need to respect the family life of an alien subject to expulsion, set out in draft article 20, paragraph 1, does not accord the alien absolute protection against expulsion. Draft article 20, paragraph 2, recognizes that this right may be subject to limitations and sets out the conditions to which such limitations are subjected. In this regard, two

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[141] See the discussion of this right in the Special Rapporteur's fifth report (A/CN.4/611), paras. 128–147 and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 446–467.

[142] See, in this regard, the above-cited memorandum of the Secretariat (A/CN.4/565), paras. 466–467.

[143] General Assembly resolution 40/144 of 13 December 1985, annex.

[144] European Convention on Establishment (with Protocol), Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141.

cumulative conditions must be met for interference in the exercise of the right to family life resulting from expulsion to be considered as justified.

(5) The first condition, which appears explicitly in article 8, paragraph 2, of the European Convention on Human Rights and implicitly in article 17, paragraph 1, of the International Covenant on Civil and Political Rights and article 21, paragraph 1, of the Arab Charter of Human Rights, is that such interference should take place only "where provided by law". That means that is that the expulsion measure must have an appropriate basis in the law of the expelling State; in other words, it must be taken on the basis of and in accordance with the law of that State.[145]

(6) The second condition relates to the "fair balance" that must be achieved between the interests of the State and those of the alien in question. The notion of "fair balance" is inspired by the case law of the European Court of Human Rights regarding article 8 of the European Convention on Human Rights and, more specifically, the requirement that "interference" in family life must be "necessary in a democratic society" within the meaning of paragraph 2 of that article.[146] In *Moustaquim v. Belgium*, the Court concluded that the expulsion of Mr. Moustaquim did not satisfy that requirement.[147] Given the circumstances of the case, in particular the long period of time during which Mr. Moustaquim had resided in Belgium, the ties of his close relatives with Belgium as well as the relatively long interval between the latest offence committed by Mr. Moustaquim and the deportation order, the Court came to the conclusion that the measure was not "necessary in a democratic society" since "a proper balance was not achieved between the interests involved, and … the means employed was therefore disproportionate to the legitimate aim pursued".[148] The Court considered on several occasions whether expulsion measures in conformity with article 8 of the European Convention on Human Rights, particularly in the cases *Nasri v. France*,[149] *Cruz Varas and others v. Sweden*[150] and *Boultif v. Switzerland*.[151] In this last case, the Court set forth a list of criteria to be applied in order to determine whether the interference in family life resulting from an expulsion is "necessary in a democratic society".[152]

> "The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.
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> In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during

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[145] This requirement is set out in general terms in draft article 4 above.

[146] For a detailed discussion of this case law, see the Special Rapporteur's fifth report (A/CN.4/611), paras. 133–147.

[147] European Court of Human Rights, *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, paras. 41–46.

[148] *Ibid.*, para. 46.

[149] *Nasri v. France*, Judgment (Merits and Just Satisfaction), 13 July 1995, Application No. 19465/92, specifically para. 46.

[150] *Cruz Varas and Others v. Sweden*, Judgment (Merits), 20 March 1991, Application No. 15576/89, specifically para. 88.

[151] *Boultif v. Switzerland*, Judgment (Merits and Just Satisfaction), 2 August 2001, Application No. 54273/00.

[152] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 460.

> that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."[153]

(7) The criterion of "fair balance" mentioned in paragraph 2 of draft article 20 also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights.[154]

Chapter III
Protection in relation to the State of destination

Article 21
Departure to the State of destination

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

Commentary

(1) Draft article 21 concerns in general the protection that an expelling State must accord an alien subject to expulsion in relation to his or her departure to a State of destination.[155] The draft article covers the possibility of both voluntary departure and forcible implementation of the expulsion decision.

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[153] *Boultif v. Switzerland*, footnote 151 above, para. 48.

[154] According to the Committee, "the separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal" (communication No. 558/1993, *Giosue, Canepa v. Canada*, Views adopted on 3 April 1997, *Official Documents of the General Assembly, Fifty-second Session, Supplement No. 40*, vol. II (A/52/40 Vol. II)), pp. 121–122, para. 11.4). In a previous case, the Committee found that "the interference with Mr. Stewart's family relation that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate State interest and due consideration was given in the deportation proceedings to the deportee's family connections" (communication No. 538/1993, *Charles E. Denart v. Canada*, Views adopted on 1 November 1996, *ibid.*, p. 59, para. 12.10).

[155] See, in this regard, the discussion in the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 1–15.

(2) Article 21, paragraph 1, provides that the expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.[156] Even though it aims to a certain extent to make voluntary departure of the alien the preferred solution, the provision cannot be interpreted as authorizing the expelling State to exert undue pressure on the alien to opt for voluntary departure rather than forcible implementation of an expulsion decision.

(3) Paragraph 2 concerns cases of forcible implementation of an expulsion decision. It provides that in such a case the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law. It should be clarified in this regard that the expression "safe transportation ... in accordance with the rules of international law" refers not only to the requirement to ensure the protection of the rights of the alien subject to expulsion and avoid any excessive use of force against the alien but also to the need to ensure, if necessary, the safety of persons other than the alien in question, for example the passengers on an aeroplane taken by the alien to travel to the State of destination.

(4) This requirement was implicit in the arbitral award rendered in the Lacoste case, although it was held that the claimant had not been subjected to harsh treatment:

> "*Lacoste* further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. ... The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."[157]

Similarly, in the *Boffolo* case, the umpire indicated in general terms that "[e]xpulsion [...] must be accomplished in the manner least injurious to the person affected".[158]

In the *Maal* case, the umpire stressed the sacred character of the human person and the requirement that an expulsion should be accomplished without unnecessary indignity or hardship:

> "[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constrained to disallow the claim.
>
> ...
>
> From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the

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[156] Concerning voluntary departure, see the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), para. 2, and the above-cited memorandum by the Secretariat (A/CN.4/625), paras. 697–701.

[157] *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. IV, pp. 3347–3348.

[158] *Boffolo* case, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 528 (Ralston, Umpire).

> spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted."[159]

(5) When transportation of the alien to the State of destination takes place, for example, by aeroplane, reference to the rules of international law also cover the rules relating to air transportation, particularly the regulations adopted in the framework of the International Civil Aviation Organization (ICAO). The Convention on International Civil Aviation and annex 9 thereto should be mentioned in particular in this respect.[160] The annex states, inter alia, that:

> "5.2.1 During the period when [...] a person to be deported is under their custody, the state officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity."

(6) In both situations considered in draft article 21 — voluntary departure of the alien or forcible implementation of the expulsion decision — paragraph 3 requires the expelling State to give the alien a reasonable period of time to prepare for his or her departure, taking into account all circumstances. The circumstances to be taken into account for the purpose of determining what seems in the case in question to be a reasonable period of time vary in nature. They can relate to, *inter alia*, ties (social, economic or other) that the alien subject to expulsion has established with the expelling State, the conduct of the alien in question, including, where applicable, the nature of the threat to the national security or public order of the expelling State that the presence of the alien in its territory could constitute or the risk that the alien would evade the authorities of the State order to avoid expulsion. The requirement of granting a reasonable period of time to prepare for departure must also be understood in the light of the need to permit the alien subject to expulsion to protect adequately his or her property rights and other interests in the expelling State.[161]

Article 22
State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

Commentary

(1) Draft article 22 concerns the determination of the State of destination of aliens subject to expulsion.[162] In this context, paragraph 1 refers first of all to the alien's State of

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[159] *Maal* case, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 732.

[160] Convention on International Civil Aviation, Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 102, p. 295, and annex 9, Facilitation; the text is also available on the ICAO website: http://www.icao.int.

[161] See, below, para. (3) of the commentary to draft article 30.

[162] See, in this regard, the discussion in the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 60–116, and in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 489–532.

nationality, since it is undisputed that that State has an obligation to receive the alien under international law.[163] However, paragraph 1 also recognizes the existence of other potential States of destination, distinguishing between States that might be obliged, under international law, to receive the alien and those that are not obliged to do so. This distinction reflects, with regard to the expulsion of aliens, the uncontested principle that a State is not required to receive aliens in its territory, save where obliged to do so by a rule of international law. While this is a fundamental distinction, it does not necessarily result in an order of priority in determining the State of destination of an expelled alien; in other words, the fact that a State of nationality has been identified and that there is, hypothetically, no legal obstacle to the alien's expulsion to that State in no way precludes the possibility of expelling the alien to another State that has the obligation to receive the alien under international law, or to any other State willing to accept him or her. In this regard, the Commission is of the view that the expelling State, while retaining a margin of appreciation in the matter, should take into consideration, as far as possible, the preferences expressed by the expelled alien for the purposes of determining the State of destination.[164]

(2) The wording "or any other State that has the obligation to receive the alien under international law" is intended to cover situations where a State other than the State of nationality of the expelled alien would be required to receive that person under a rule of international law, whether a treaty rule binding on that State or a rule of customary international law.[165] One should also mention, in this context, the position expressed by the Human Rights Committee in relation to article 12, paragraph 4, of the International Covenant on Civil and Political Rights:

> "The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence."[166]

(3) Draft article 22, paragraph 2, addresses the situation where it has not been possible to identify either the State of nationality or any other State that has the obligation to receive the alien under international law. In such cases, it is stated that the alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State. The last phrase ("the State from where he or she has entered the expelling State") should be understood primarily to mean the State of embarkation, although the chosen wording is sufficiently general also to cover situations

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[163] See, on this point, the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 90–96.

[164] See, in this regard, the discussion in the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 75 and 76.

[165] For examples of the first hypothesis, see *ibid.*, paras. 104–107.

[166] General comment No. 27, Freedom of movement (art. 12), adopted on 18 October 1999, para. 20.

where an alien has entered the territory of the expelling State by a mode of transport other than air transport. The content and wording of this paragraph were the subject of intense debate within the Commission. One view expressed was that if no State of destination could be identified in accordance with paragraph 1, the expelling State should authorize the alien subject to expulsion to remain in its territory, since no other State could be forced to receive him or her. Moreover, opinion within the Commission was divided on the issue of whether certain States, such as a State that had issued the alien in question with a travel document, entry permit or residence permit, or the State of embarkation, would have an obligation to receive the alien under international law, in which case paragraph 1 of the draft article would apply. While some members of the Commission considered that a State that had issued an entry permit or residence permit to an alien would have such an obligation, other members believed that by issuing an entry permit or residence permit to an alien a State did not assume any international obligation to receive the alien *vis-à-vis* other States, including a State that had expelled the alien in question from its territory. In that regard, it was argued within the Commission that the State that had issued such a permit would still be entitled to refuse to allow the alien in question to return to its territory, citing reasons of public order or national security. Different views were also expressed regarding the position of the State of embarkation. While the point was made that expulsion to the State of embarkation was a common practice that should be mentioned in the draft articles, the view was also expressed that the State of embarkation has no legal obligation to receive the expelled alien.[167]

(4) The Commission is aware of the role played by readmission agreements in determining the State of destination of an expelled alien. These agreements fall within the extremely broad scope of international cooperation, in which States exercise their sovereignty in light of variable considerations that in no way lend themselves to normative standardization through codification. That being the case, the Commission considered that such agreements should not be the subject of a specific draft article. That said, it is important to note that such agreements should be implemented in compliance with the relevant rules of international law, particularly those aimed at protecting the human rights of the alien subject to expulsion.

(5) Determination of the State of destination of the alien subject to expulsion under draft article 22 must be done in compliance with the obligations contained in draft article 6, paragraph 3 (prohibition of *refoulement*), and in draft articles 23 and 24, which prohibit expulsion of an alien to a State where his or her life or freedom would be threatened or to a State where the alien could be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 23

Obligation not to expel an alien to a State where his or her life or freedom would be threatened

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless

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[167] There appear to be different views as to whether the expelling State incurs international responsibility for an internationally wrongful act by expelling an alien to a State that has no obligation — and refuses — to receive him or her; see, in this regard, the above-cited memorandum by the Secretariat (A/CN.4/565), para. 595, and the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 111–116.

it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Commentary

(1) Draft article 23 deals with protection of the life or freedom of an alien subject to expulsion in relation to the situation in the State of destination. Paragraph 1 prohibits the expulsion of an alien "to a State where his or her life or freedom would be threatened" on one of the grounds set out in draft article 15, which establishes the obligation not to discriminate. The wording referring to a State "where his or her life or freedom would be threatened", which delimits the scope of this prohibition of expulsion, corresponds to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*).

(2) The prohibited grounds of discrimination set out in draft article 15 and reproduced in draft article 23 are those contained in article 2, paragraph 1, of the International Covenant on Civil and Political Rights. The Commission considers that there is no valid reason why the list of discriminatory grounds in draft article 23 should be less broad in scope than the list contained in draft article 15. In particular, the Commission was of the view that the list of grounds contained in article 33 of the 1951 Convention was too narrow for the present draft article, which addressed the situations not only of persons who could be defined as "refugees", but of aliens in general, and in a wide range of possible situations.

(3) As is the case of draft article 15, the Commission discussed whether sexual orientation should be included in the prohibited grounds of discrimination. Since divergent views were expressed by members of the Commission on this point, the approach taken in draft article 15 and in the commentary to that draft article was adopted here as well.

(4) Paragraph 2 of draft article 23 concerns the specific situation where the life of an alien subject to expulsion would be threatened in the State of destination by the imposition or execution of the death penalty, unless an assurance has previously been obtained that the death penalty will not be imposed or, if already imposed, will not be carried out.[168] The Human Rights Committee has taken the position that, under article 6 of the Covenant, States that have abolished the death penalty may not expel a person to another State in which he or she has been sentenced to death, unless they have previously obtained an assurance that the penalty will not be carried out.[169] While it may be considered that, within these precise limits, this prohibition now corresponds to a distinct trend in international law, it would be difficult to state that international law goes any further in this area.[170]

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[168] On the issue of the death penalty in the context of expulsion, see the Special Rapporteur's fifth report (A/CN.4/611), paras. 56–67.

[169] See, in this regard, Human Rights Committee, Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40, vol. II* (A/58/40 (Vol. II)), p. 93, para. 10.6: "For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author."

[170] See, in this regard, the explanations given in the Special Rapporteur's fifth report (A/CN.4/611), para. 66.

(5) Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects: first, because the prohibition established in paragraph 2 covers not only States that have abolished the death penalty, but also States that retain the penalty in their legislation but do not apply it in practice: this is the meaning of the phrase, "[a] State that does not apply the death penalty"; second, because the scope of protection has been extended to cover not only situations where the death penalty has already been imposed but also those where there is a real risk that it will be imposed.

Article 24
Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Commentary

(1) The wording of draft article 24, which obliges the expelling State not to expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment,[171] is based on article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[172] However, draft article 24 broadens the scope of the protection afforded by this provision of the Convention, since the obligation not to expel contained in the draft article covers not only torture, but also other cruel, inhuman or degrading treatment or punishment. This broader scope of the prohibition reflects, *inter alia*, the jurisprudence of the European Court of Human Rights concerning article 3 of the European Convention on Human Rights.[173] A recommendation of the Committee on the Elimination of Racial Discrimination takes a similar stance.[174]

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[171] See, with regard to this obligation, the Special Rapporteur's fifth report (A/CN.4/611), paras. 73–120, and the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 540–573.

[172] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85. Article 3 of the Convention states:

> "1. No State party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[173] See, in particular, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, paras. 72–107. In paragraph 80, the Court states: "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees ..." See also the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 565–571.

[174] See the recommendation of the Committee on the Elimination of Racial Discrimination to States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, United Nations, *Treaty Series*, vol. 660, No. 9464, p. 212) to

(2) With regard to determining the existence of "substantial grounds" within the meaning of draft article 24, attention should be drawn to article 3, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that the competent authorities shall take into account "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". This provision has been interpreted on many occasions by the Committee against Torture established pursuant to the Convention, which has considered a number of communications alleging that the expulsion of aliens to particular States was contrary to article 3.[175]

(3) The Committee against Torture has adopted guidelines concerning the implementation of article 3 in its general comment No. 1.[176] These guidelines indicate the information that may be relevant in determining whether the expulsion of an alien to a particular State is consistent with article 3:

> "The following information, while not exhaustive, would be pertinent:
>
> (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
>
> (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
>
> (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
>
> (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
>
> (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
>
> (f) Is there any evidence as to the credibility of the author?
>
> (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"[177]

The Committee has also indicated that substantial grounds for believing that there is a risk of torture require more than a mere theory or suspicion but less than a high probability of such a risk.[178] Other elements on which the Committee against Torture has provided

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"[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment" (general recommendation No. 30: Discrimination against non-citizens, 64th session, 23 February–12 March 2004, para. 27).

[175] For a list of relevant communications, see the above-cited memorandum by the Secretariat (A/CN.4/565), para. 541.

[176] Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1), adopted on 21 November 1997.

[177] *Ibid.*, para. 8.

[178] *Ibid.*, para. 6: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of

important clarifications are the existence of a personal risk of torture;[179] the existence, in this context, of a present and foreseeable danger;[180] the issue of subsequent expulsion to a third State;[181] and the absolute nature of the prohibition.[182]

(4) As was the case for draft article 18,[183] the Commission preferred not to address, in the text of draft article 24, situations where the risk of torture or cruel, inhuman or degrading treatment or punishment emanated from persons or groups of persons acting in a private capacity.[184] In this regard, it should be recalled that in its general comment No. 1, the Committee against Torture expressed the following view on this issue:

> "Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of 'a consistent pattern or gross, flagrant or mass violations of human rights' refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[185]

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being highly probable."

[179] Ibid., para. 1: "Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention." See also: Committee against Torture, communication No. 13/1993, *Mutombo v. Switzerland*, Views adopted on 27 April 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), p. 52, para. 9.3, and other findings of the Committee against Torture, mentioned in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 546–548.

[180] See the findings of the Committee against Torture mentioned in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 549–555.

[181] See, on this point, the above-cited general comment No. 1 of the Committee against Torture, para. 2: "The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited"; and other findings of the Committee against Torture contained in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 560–561.

[182] See the findings of the Committee against Torture mentioned in the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 562–564.

[183] See para. (3) of the commentary to draft article 18 above.

[184] See, however, the text of revised draft article 15 (A/CN.4/617), presented by the Special Rapporteur to the Commission following the debate, paragraph 2 of which contained the additional words "and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection", in order to reflect the jurisprudence of the European Court of Human Rights in *H.L.R v. France*, cited below.

[185] Committee against Torture, general comment on the implementation of article 3 of the Convention in the context of article 22 (general comment No. 1) (A/53/44), annex IX, adopted on 21 November 1997, para. 3. See also Committee against Torture, communication No. 258/2004, *Mostafa Dadar v. Canada*, Decision adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), p. 241, para. 8.4; communication No. 177/2001, *H.M.H.I. v. Australia*, Decision adopted on 1 May 2002, *ibid., Fifty-seventh Session, Supplement No. 44* (A/57/44), p. 171, para. 6.4; and communication No. 191/2001, *S.S. v. The Netherlands*, Decision adopted on 5 May 2003, *ibid., Fifty-eighth Session, Supplement No. 44* (A/58/44), p. 123, para. 6.4: "The issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned."

See also communication No. 237/2003, *Ms. M.C.M.V.F. v. Sweden*, Decision adopted on 14 November 2005, *ibid., Sixty-first Session, Supplement No. 44* (A/61/44), p. 194, para. 6.4:

> "The Committee has not been persuaded that the incidents that concerned the complainant in 2000 and 2003 were linked in any way to her previous political activities or those of her

For its part, the European Court of Human Rights has drawn from the absolute character of article 3 of the European Convention on Human Rights the conclusion that the said provision also covers cases where the danger emanates not from the State of destination itself but from "persons or groups of persons who are not public officials", when the State of destination is not able to offer adequate protection to the individual concerned.

> "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[186]

> husband, and considers that the complainant has failed to prove sufficiently that those incidents be attributable to state agents or to groups acting on behalf of or under the effective control of state agents";

and communication No. 120/1998, *S.S. Elmi v. Australia*, Views adopted on 14 May 1999, *ibid., Fifty-fourth Session, Supplement No. 44* (A/54/44), pp. 119–120, paras. 6.5–6.8:

> "The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1.

The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her report the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.

The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.

In addition to the above, the Committee considers that two factors support the author's case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity of the author's claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye."

[186] *H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 40.

Chapter IV
Protection in the transit State

Article 25
Protection in the transit State of the human rights of an alien subject to expulsion

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

Commentary

The implementation of an expulsion order often involves the transit of the alien through one or more States before arrival in the State of destination.[187] In draft article 25, the Commission therefore considered it essential to draw attention to the transit State's obligation to protect the human rights of the alien subject to expulsion, in conformity with its obligations under international law. The chosen wording clearly indicates that the transit State is obliged to respect only its own obligations under international conventions to which it is a party or under the rules of general international law, and not obligations that are, *ex hypothesi*, binding on the expelling State alone.

Part Four
Specific procedural rules

Article 26
Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

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[187] With regard to the transit State, see the discussion in the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 117–118.

Commentary

(1) Draft article 26, paragraph 1, sets out a list of procedural rights from which any alien subject to expulsion must benefit, irrespective of whether that person is lawfully or unlawfully present in the territory of the expelling State. The sole exception — to which reference is made in paragraph 4 of the draft article — is that of aliens who have been unlawfully present in the territory of that State for less than six months.

(2) Paragraph 1 (a) sets forth the right to receive notice of the expulsion decision. The expelling State's respect for this essential guarantee is a *conditio sine qua non* for the exercise by an alien subject to expulsion of all of his or her procedural rights. This condition was explicitly embodied in article 22, paragraph 3, of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stipulates that the expulsion decision "shall be communicated to them in a language they understand". In 1892 the Institute of International Law already expressed the view that "*l'acte ordonnant l'expulsion est notifié à l'expulsé*" [the expulsion order shall be notified to the expellee][188] and also that "*si l'expulsé a la faculté de recourir à une haute cour judiciaire ou administrative, il doit être informé, par l'acte même, et de cette circonstance et du délai à observer*" [if the expellee is entitled to appeal to a high judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal].[189] The legislation of a number of States contains a requirement that a decision on expulsion must be notified to the alien concerned.[190]

(3) Paragraph 1 (b) sets out the right to challenge the expulsion decision, a right well established in international law. At the universal level, article 13 of the International Covenant on Civil and Political Rights provides the individual facing expulsion with the right to submit the reasons against his or her expulsion, except where "compelling reasons of national security otherwise require". It states that "[a]n alien lawfully in the territory of a State Party to the present Covenant … shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion*"[191] (emphasis added). The same right is to be found in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144 of 13 December 1985, which provides that "[a]n alien lawfully in the territory of a State … shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled". At the regional level, article 1, paragraph 1 (a) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien lawfully resident in the territory of a State and subject to an expulsion order shall be allowed "to submit reasons against his expulsion". Article 3, paragraph 2, of the European Convention on Establishment offers the same safeguard by providing that "[e]xcept where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the

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[188] *Règles internationales sur l'admission et l'expulsion des étrangers*, [International Regulations on the Admission and Expulsion of Aliens] adopted on 9 September 1892, at the Geneva session of the Institute of International Law, art. 30. [French original]

[189] *Ibid*., art. 31.

[190] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 649.

[191] See Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. II (A/45/40 (Vol. II)), pp. 40–41, para. 5.5. The Committee found that the Dominican Republic had violated article 13 of the Covenant by not taking its decision "in accordance with law" and by also omitting to afford the person concerned an opportunity to submit the reasons against his expulsion and have his case renewed by a competent authority.

territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion". Lastly, the right of an alien to contest his or her expulsion is also embodied in internal law.[192]

(4) The Commission considers that the right to be heard by a competent authority, set out in paragraph 1 (c), is essential for the exercise of the right to challenge an expulsion decision, which forms the subject of paragraph 1 (b). Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to be heard, the Human Rights Committee has taken the view that a decision on expulsion adopted without the alien having been given an opportunity to be heard may raise questions under article 13 of the Covenant:

> "The Committee is also concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government, resulting in decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant."[193]

The national laws of several States grant aliens the right to be heard during expulsion proceedings, as do many national tribunals.[194] Given the divergence in State practice in this area, it cannot be said that international law gives an alien subject to expulsion the right to be heard in person by the competent authority. What is required is that an alien be furnished with an opportunity to explain his or her situation and submit his or her own reasons before the competent authority. In some circumstances, written proceedings may satisfy the requirements of international law. One writer, commenting on the decisions of the Human Rights Committee concerning cases related to articles 13 and 14 of the Covenant, expressed the opinion that "[e]ven though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Article 13 does not, in contrast to Article 14, paragraph 3 (d), give rise to a right to personal appearance".[195]

(5) Paragraph 1 (d) sets out the right of access to effective remedies to challenge the expulsion decision. While article 13 of the International Covenant on Civil and Political Rights entitles an alien lawfully present in the expelling State to a review of the expulsion decision, it does not specify the type of authority which should undertake the review:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed … *to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority*"[196] (emphasis added).

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[192] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

[193] Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/5140 (Vol. I)), para. 88.

[194] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 618.

[195] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, 2nd revised ed. (Kehl am Rhein, N.P. Engel Publisher, 2005), p. 297 (citing communications No. 173/1984, *M.F. v. The Netherlands*, para. 4; No. 236/1987, *V.M.R.B. v. Canada*; No. 155/1983, *Eric Hammel v. Madagascar*, paras. 19.2 and 20; and No. 193/1985, *Pierre Giry v. Dominican Republic*, paras. 5.5 and 6).

[196] Human Rights Committee, communication No. 193/1985, *Pierre Giry v. Dominican Republic*, Views adopted on 20 July 1990, para. 5.5. (The Committee found that the Dominican Republic had violated

The Human Rights Committee has drawn attention to the fact that the right to a review, as well as the other guarantees provided in article 13, may be departed from only if "compelling reasons of national security" so require. The Committee has also stressed that the remedy at the disposal of the alien expelled must be an effective one:

> "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require."[197]

The Human Rights Committee has also considered that protests lodged with the expelling State's diplomatic or consular missions abroad are not a satisfactory solution under article 13 of the International Covenant on Civil and Political Rights:

> "In the Committee's opinion, the discretionary power of the Minister of the Interior to order the expulsion of any alien, without safeguards, if security and the public interest so require poses problems with regard to article 13 of the Covenant, particularly if the alien entered Syrian territory lawfully and has obtained a residence permit. Protests lodged by the expelled alien with Syrian diplomatic and consular missions abroad are not a satisfactory solution in terms of the Covenant."[198]

Article 13 of the European Convention on Human Rights recognizes a right to an effective remedy with respect to a violation of any right or freedom set forth in the Convention, including in cases of expulsion:[199]

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In respect of a complaint based on article 3 of the European Convention on Human Rights concerning a case of expulsion, the European Court of Human Rights said the following about the effective remedy to which article 13 refers:

> "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the

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article 13 of the Covenant by omitting to afford the person concerned an opportunity to have his case reviewed by a competent authority.)

[197] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 10. In *Eric Hammel v. Madagascar* (communication No. 155/1983, Views adopted on 3 April 1987, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 138, para. 19.2), the Committee considered that the claimant had not been given an effective remedy to challenge his expulsion. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 74.

[198] Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), para. 82 (22), p. 75.

[199] In contrast, the applicability of article 6 of the European Convention on Human Rights in cases of expulsion is less clear. "When no right under the Convention comes into consideration, only the procedural guarantees that concern remedies in general are applicable. While Article 6 only refers to remedies concerning 'civil rights and obligations' and 'criminal charges', the Court has interpreted the provision as including also disciplinary sanctions. Measures such as expulsion that significantly affect individuals should also be regarded as covered" (Giorgio Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 309–310).

> notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State."[200]

Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms grants the alien subject to expulsion the right to have his or her case reviewed by a competent authority:

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> ...
>
> b. to have his case reviewed, and
>
> ...
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

Similarly, article 3, paragraph 2 of the European Convention on Establishment provides:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and *to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority*" (emphasis added).

Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 32, paragraph 2, of the Convention relating to the Status of Refugees; article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons; article 9, paragraph 5, of the European Convention on the Legal Status of Migrant Workers;[201] and article 26, paragraph 2, of the Arab Charter on Human Rights also require that there be a possibility of appealing against an expulsion decision. This right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144:

> "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and *to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority*" (emphasis added).

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[200] European Court of Human Rights, *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 151.

[201] European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, United Nations, *Treaty Series*, vol. 1496, No. 25700, p. 7.

In its General Recommendation No. 30, the Committee on the Elimination of Racial Discrimination stressed the need for an effective remedy in the event of expulsion and recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination should:

> "Ensure that … non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."[202]

The requirement that the alien subject to expulsion be provided with a review procedure has also been stressed by the African Commission on Human and Peoples' Rights with respect to illegal immigrants:

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[203]

Similarly, in another case, the African Commission on Human and Peoples' Rights held that Zambia had violated the African Charter on Human and Peoples' Rights by not giving an individual the opportunity to challenge an expulsion order:

> "36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened to him in terms of the Citizenship Act … By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of Article 12 (4) have been violated.
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> …
>
> 38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government cannot say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the Courts of Zambia. Zambia has violated Article 7 of the Charter.
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> …
>
> 52. Article 7 (1) states that:
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> 'Every individual shall have the right to have his cause heard …

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[202] Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 25. See also the Committee's concluding observations concerning France, 1 March 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 18* (A/49/18), para. 144 (right of appeal).

[203] African Commission on Human and Peoples' Rights, communication No. 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola*, Eleventh Annual Activity Report, 1997–1998, para. 20.

> (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed …'.
>
> 53. The Zambia government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to a fair hearing, which contravenes all Zambian domestic laws and international human rights laws."[204]

(6) Paragraph 1 (e), the content of which is based on article 13 of the International Covenant on Civil and Political Rights, gives an alien subject to expulsion the right to be represented before the competent authority. In the Commission's opinion, from the standpoint of international law, this right does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings.

(7) The Commission considers that the right of an alien to the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority, which is set out in paragraph 1 (f) and recognized in the legislation of a number of States,[205] is an essential element of the right to be heard, which is set out in paragraph 1 (c). It is also of some relevance to the right to be notified of the expulsion decision and the right to challenge that decision, to which paragraphs 1 (a) and (b) of this draft article refer. In this connection, it will be noted that the Committee on the Rights of the Child expressed concerns at reports of "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to … interpretation".[206] The Commission takes the view that free interpretation is vital to the effective exercise by the alien in question of all of his or her procedural rights. In this context, the alien must inform the competent authorities of the language(s) which he or she is able to understand. However, the Commission considers that the right to the free assistance of an interpreter should not be construed as including the right to the translation of possibly voluminous documentation, or to interpretation into a language which is not commonly used in the region where the State is located or at the international level, provided that this can be done without impeding the fairness of the hearing. The wording of paragraph 1 (f) is based on article 14, paragraph 1 (f), of the International Covenant on Civil and Political Rights, which makes provision for that right in the context of criminal proceedings.

(8) The Commission is of the view that under general international law the expelling State must respect the procedural rights set forth in draft article 26, paragraph 1. Nevertheless, paragraph 2 specifies that the procedural rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law. This refers primarily to the rights or guarantees that the expelling State's legislation offers aliens (for example, possibly a right to free legal assistance[207]), which that State would be bound to respect by virtue of its international legal obligation to comply with the law throughout the expulsion procedure.[208] In addition, paragraph 2 should be understood to preserve any other procedural right to which an alien subject to expulsion is entitled under a rule of international law, in particular one laid down in a treaty, which is binding on the expelling State.

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[204] African Commission on Human and Peoples' Rights, communication No. 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report, 1998–1999.

[205] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 645.

[206] Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, (CRC/C/15/Add.185), para. 45 (a).

[207] See the discussion of this issue in the above-cited memorandum by the Secretariat (A/CN.4/625), para. 641, and in the first addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.1), paras. 110–113.

[208] See draft article 4 above and the commentary thereto.

(9) Draft article 26, paragraph 3, deals with consular assistance, the purpose of which is to safeguard respect for the rights of an alien subject to expulsion. This paragraph refers to the alien's right to *seek* consular assistance, which is not synonymous with a right to obtain that assistance. From the standpoint of international law, the alien's State of nationality remains free to decide whether or not to furnish him or her with assistance, and the draft article does not address the question of the possible existence of a right to consular assistance under that State's internal law. At the same time, the expelling State is bound, under international law, not to impede the exercise by an alien of his or her right to seek consular assistance or, as the case may be, the provision of such assistance by the sending State. The right of an alien subject to expulsion to seek consular assistance is also expressly embodied in some national legislation.[209]

(10) The consular assistance referred to in draft article 26, paragraph 3, encompasses the various forms of assistance which the alien subject to expulsion might receive from his or her State of nationality in conformity with the rules of international law on consular relations, most of which are reflected in the Vienna Convention on Consular Relations of 24 April 1963.[210] The right of the alien concerned to seek consular assistance and the obligations of the expelling State in that context must be ascertained in the light of those rules. Particular mention should be made of article 5 of the Convention, which lists consular functions, and of article 36, which concerns communication between consular officials and nationals of the sending State. Article 36, paragraph 1 (a), guarantees freedom of communication in very general terms, which suggests that it is a guarantee that applies fully in expulsion proceedings. Moreover the same guarantee is set forth in equally general terms in article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144.[211] Article 36, paragraph 1 (b) of the Vienna Convention on Consular Relations, which concerns a person who has been committed to prison or to custody pending trial, or who has been detained in any other manner, requires the receiving State to inform the consular post if the person concerned so requests and to inform the person of his or her rights in that respect. Paragraph 1 (c) states that consular officials shall have the right to visit a national of the sending State who has been placed in detention. The International Court of Justice has applied article 36 of the Vienna Convention on Consular Relations in contexts other than that of the expulsion of aliens, for example in the cases concerning *La Grand and Avena and Other Mexican Nationals*.[212] The Court noted that "Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State"[213] and that "[t]he clarity of these provisions, viewed in their context, admits of no doubt".[214] The Court again examined this question in relation to detention for the purposes of expulsion in its Judgment of 30 November 2010 in the case

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[209] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 631. See also the first addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.1), paras. 97–102.

[210] Vienna Convention on Consular Relations, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[211] This provision reads: "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."

[212] *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001 *I.C.J. Reports 2001*, paras. 64–91; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, *I.C.J. Reports 2004*, paras. 49–114.

[213] *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, *I.C.J. Reports 2001*, para. 77.

[214] *Ibid*.

concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In accordance with the precedent established in the case concerning *Avena and Other Mexican Nationals*,[215] the Court noted that it is for the authorities of the State which proceeded with the arrest:

> "to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect ... Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights 'without delay'."[216]

Having noted that the Democratic Republic of the Congo had not provided "the slightest piece of evidence" to corroborate its assertion that it had orally informed Mr. Diallo of his rights, the Court found that there had been a violation by that State of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations.[217]

(11) Paragraph 4 concerns aliens who have been unlawfully present in the territory of the expelling State for less than six months. It takes the form of a "without prejudice" clause which, in such cases, seeks to preserve the application of any legislation of the expelling State concerning the expulsion of such persons. While some members contended that there was a hard core of procedural rights from which all aliens without exception must benefit, the Commission preferred to follow a realistic approach, because it could not disregard the fact that several States' national laws make provision for simplified procedures for the expulsion of aliens unlawfully present in their territory. Under these procedures such aliens often do not even have the right to challenge their expulsion, let alone the procedural rights enumerated in paragraph 1, whose purpose is to give effect to that right. This being so, as an exercise in the progressive development of international law the Commission considered that even foreigners unlawfully present in the territory of the expelling State for a specified minimum period of time should have the procedural rights listed in paragraph 1. After analysing some national legislation,[218] the Commission concluded that it was reasonable to set the duration of that period at six months. Some members thought that factors other than the duration of the alien's unlawful presence in the expelling State's territory ought to be borne in mind when determining the procedural rights which that alien should enjoy during expulsion proceedings. In that connection, reference was made to the level of (social, occupational, economic or family) integration of the alien in question. The Commission considered, however, that assessing and applying such criteria would be difficult, especially as national practice diverged in that respect.

Article 27
Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

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[215] Judgment, *I.C.J. Reports 2004*, para. 76.

[216] Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 95.

[217] *Ibid.*, paras. 96 and 97.

[218] See the discussion of this point in the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 17–40.

Commentary

(1) Draft article 27, which recognizes the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State, is progressive development of international law. The Commission considers that State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision.[219]

(2) However, the Commission considered that the recognition of a suspensive effect in a draft article was warranted. One of the reasons militating in favour of a suspensive effect is certainly the fact that, unless the execution of the expulsion decision is stayed, an appeal might well be ineffective in view of the potential obstacles to return, including those of an economic nature, which might be faced by an alien who in the intervening period has had to leave the territory of the expelling State as a result of an expulsion decision, the unlawfulness of which was determined only after his or her departure.

(3) According to one point of view expressed within the Commission, positive law already recognized the suspensive effect of an appeal against an expulsion decision when an alien could reasonably plead that his or her life or freedom would be threatened in the State of destination,[220] or that there was risk of being subjected to ill-treatment there[221] as grounds for challenging the decision. In addition, with a view to progressive development, some members would have preferred the Commission to recognize the suspensive effect not only of an appeal lodged by an alien lawfully present in the territory of the expelling State, but also of an appeal lodged by certain categories of aliens who, although unlawfully present in its territory, had already been there for some time or met other conditions, such as a sufficient level of social, economic, family or other integration in the expelling State.

(4) In this context, it is interesting to note the position of the European Court of Human Rights regarding the effects of an appeal on the execution of the decision. While the Court recognized the discretion enjoyed by States parties in this respect, it indicated that measures whose effects are potentially irreversible should not be enforced before the national authorities have determined whether they are compatible with the Convention. For example, in the case of *Čonka v. Belgium* the Court concluded that there had been a violation of article 13 of the Convention:

> "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible … . Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision."[222]

(5) One might also mention that the Parliamentary Assembly of the Council of Europe has recommended that aliens expelled from the territory of a member State of the Council

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[219] See also the initial hesitations expressed by the Special Rapporteur in the second addendum to his sixth report as to the advisability of formulating a general rule regarding the suspensive effect of a remedy against an expulsion decision (A/CN.4/625/Add.2), paras. 51–55.

[220] See draft article 23 above.

[221] See draft article 24 above.

[222] European Court of Human Rights, *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 79.

of Europe should be entitled to a suspensive appeal, which should be considered within three months from the date of the decision on expulsion:

> "With regard to expulsion: ii. any decision to expel a foreigner from the territory of a Council of Europe member state should be subject to a right of suspensive appeal; iii. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel".[223]

In this context it is interesting to note that the Parliamentary Assembly also took the view that an alien who was not lawfully present also had this right of appeal:

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious. He shall have the right and the possibility of appealing to an independent appeal authority before being removed. It should be studied if also, or alternatively, he shall have the right to bring his case before a judge. He shall be informed of his rights. If he applies to a court or to a high administrative authority, no removal may take place as long as the case is pending;
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> A person holding a valid residence permit may only be expelled from the territory of a member state in pursuance of a final court order."[224]

The Commission did not go as far as this.

Article 28
Procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

Commentary

The purpose of draft article 28 is to make it clear that aliens subject to expulsion may, in some cases, be entitled to individual recourse to a competent international body. The individual recourse procedures in question are mainly those established under various universal and regional human rights instruments.

Part Five
Legal consequences of expulsion

Article 29
Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

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[223] Parliamentary Assembly of the Council of Europe, Recommendation 1624 (2003), Common policy on migration and asylum, 30 September 2003, para. 9.

[224] Parliamentary Assembly of the Council of Europe, Appendix to Recommendation 769 (1975) on the legal status of aliens, 3 October 1975, paras. 9–10.

Commentary

(1) Draft article 29 recognizes, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State. Although recognition of such a right — on a variety of conditions — may be discerned in the legislation of some States[225] and even at the international level,[226] practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.

(2) Even from the standpoint of progressive development, the Commission was cautious about formulating any such right. Draft article 29 therefore concerns solely the case of an alien lawfully present in the territory of the State in question who has been expelled unlawfully and applies only when a competent authority has established that the expulsion was unlawful and when the expelling State cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question.

(3) The adjective "unlawful" qualifying expulsion in the draft article refers to any expulsion in breach of a rule of international law. It must also, however, be construed in the light of the principle, set forth in article 13 of the International Covenant on Civil and Political Rights and reiterated in draft article 4, that an alien may be expelled only in pursuance of a decision reached in accordance with law, that is to say primarily in accordance with the internal law of the expelling State.

(4) Under draft article 29, a right of readmission is recognized only in situations where the authorities of the expelling State, or an international body such as a court or a tribunal which is competent to do so, have found in a binding determination that expulsion was unlawful. Such a determination is not present when an expulsion decision which was unlawful at the moment when it was taken is held by the competent authorities to have been cured in accordance with the law. The Commission considered that it would have been inappropriate to make the recognition of this right subject to the annulment of the unlawful expulsion decision, since in principle only the authorities of the expelling State are competent to annul such a decision. The wording of draft article 29 also covers situations where expulsion has occurred without the adoption of a formal decision, in other words through conduct attributable to the expelling State.[227] That said, by making the right of readmission subject to the existence of a prior determination by a competent authority as to the unlawfulness of the expulsion, draft article 29 avoids giving the alien, in this context, the right to judge for him or herself whether the expulsion to which he or she has been subject was lawful or unlawful.

(5) Draft article 29 should not be understood as conferring on the determinations of international bodies legal effects other than those for which provision is made in the

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[225] See in this connection the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), paras. 153–157.

[226] The Inter-American Commission on Human Rights in effect recognized the existence of this right in a case involving the arbitrary expulsion of a foreign priest, in that it resolved:

> "To recommend to the government of Guatemala: a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; b) that it investigate the acts reported and punish those responsible for them; and c) that it inform the Commission in 60 days on the measures taken to implement these recommendations" (Inter-American Commission on Human Rights, Resolution 30/81, Case 73/78 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9 rev.1, 16 October 1981).

[227] See in this connection draft article 11 above, which prohibits all forms of disguised expulsion.

instrument by which the body in question was established. It recognizes only, as a matter of progressive development, and on an independent basis, a right to readmission to the territory of the expelling State, the existence of which right is subject, *inter alia*, to a previous determination that the expulsion was unlawful.

(6) As this draft article clearly indicates, the expelling State retains the right to deny readmission to an alien who has been unlawfully expelled, if that readmission constitutes a threat to national security or public order or if, for any other reason, the alien no longer fulfils the conditions for admission under the law of the expelling State. The Commission is of the view that it is necessary to allow such exceptions to readmission in order to preserve a fair balance between the rights of the unlawfully expelled alien and the power of the expelling State to control the entry of any alien to its territory in accordance with its legislation in force when a decision is to be taken on the readmission of the alien in question. The purpose of the final exception mentioned in draft article 29 is to take account of the fact that, in some cases, the circumstances or facts forming the basis on which an entry visa or residence permit was issued to the alien might no longer exist. A State's power to assess the conditions for readmission must, however, be exercised in good faith. For example, the expelling State would not be entitled to refuse readmission on the basis of legislative provisions which made the mere existence of a previous expulsion decision a bar to readmission. This restriction is reflected in draft article 29, paragraph 2, which states: "In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted." This formulation draws on the wording of article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[228]

(7) Lastly, recognition of a right to readmission under draft article 29 is without prejudice to the legal regime governing the responsibility of States for internationally wrongful acts, to which reference is made in draft article 31. In particular, the legal rules governing reparation for an internationally wrongful act remain relevant in the context of the expulsion of aliens.

Article 30
Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Commentary

(1) Draft article 30, which concerns the protection of the property of an alien subject to

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[228] The provision reads: "If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the *earlier decision shall not be used to prevent him or her from re-entering the State concerned*" (emphasis added).

expulsion,[229] establishes two obligations for the expelling State. The first relates to the adoption of measures to protect the property of the alien in question, while the second concerns the free disposal by the alien of his or her property.

(2) The wording of article 30 is sufficiently general to encompass all the guarantees relating to the protection of the property of an alien subject to expulsion under the applicable legal instruments. It should be recalled that article 17, paragraph 2, of the Universal Declaration of Human Rights states that "[n]o one shall be arbitrarily deprived of his property". Concerning expulsion more specifically, article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that:

> "6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
>
> …
>
> 9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her."

At the regional level, article 14 of the African Charter on Human and Peoples' Rights states that:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

The American Convention on Human Rights (Pact of San José, Costa Rica) states in article 21 on the right to property that:

> "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> […]"

Similarly, article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[230] states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

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[229] See, in this regard, the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 125–150.

[230] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Paris, 20 March 1952, United Nations, *Treaty Series*, vol. 213, No. 2889, article 1, p. 262.

> accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Lastly, article 31 of the Arab Charter on Human Rights states:

> "Everyone has a guaranteed right to own property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property."

(3) It may be considered that the obligation to protect the property of an alien subject to expulsion ought to involve allowing the individual a reasonable opportunity to protect the property rights and other interests that he or she may have in the expelling State.[231] Failure to give an alien such opportunity has given rise to international claims.[232] As early as 1892, the Institute of International Law adopted a resolution containing a provision indicating that aliens who are domiciled or resident, or have a commercial establishment in the expelling State, shall be given the opportunity to settle their affairs and interests before leaving the territory of that State.

> *« L'expulsion d'étrangers domiciliés, résidents ou ayant un établissement de commerce ne doit être prononcée que de manière à ne pas trahir la confiance qu'ils ont eue dans les lois de l'État. Elle doit leur laisser la liberté d'user, soit directement, si c'est possible, soit par l'entremise de tiers par eux choisis, de toutes les voies légales pour liquider leur situation et leurs intérêts, tant actifs que passifs, sur le territoire. »* [Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory][233]

More than a century later, the Iran-United States Claims Tribunal held, in *Rankin v. The Islamic Republic of Iran*, that an expulsion was unlawful if it denied the alien concerned a reasonable opportunity to protect his or her property interests:

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[231] See in this regard the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 711–714.

[232] In the *Hollander* case, the United States claimed compensation from Guatemala for the summary expulsion of one of its citizens and pointed out that Mr. Hollander "… was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him, [and claimed that] [t]he Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquility to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three years before …" (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been Party*, vol. IV, p. 107). See also David John Harris, *Cases and Materials on International Law*, 4th ed. (London, Sweet & Maxwell, 1991), p. 503, Letter from U.S. Dept. of State to Congressman, 15 December 1961, 8 Whiteman 861 (case of *Dr. Breger*): "As to Dr. Breger's expulsion from the island of Rhodes in 1938, it may be pointed out that under generally accepted principles of international law, a State may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner, such as by using unnecessary force to effect the expulsion or by otherwise mistreating the alien or by refusing to allow the alien a reasonable opportunity to safeguard property. In view of Dr. Breger's statement to the effect that he was ordered by the Italian authorities to leave the island of Rhodes within six months, it appears doubtful that international liability of the Italian Government could be based on the ground that he was not given enough time to safeguard his property."

[233] *Règles internationales sur l'admission et l'expulsion des étrangers* [International Regulations on the Admission and Expulsion of Aliens], Geneva session, 1892, resolution of 9 September 1892, art. 41.

> "The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State's right to expel aliens from its territory, as found in the provisions of the Treaty of Amity and in customary international law. ... For example, by depriving an alien of a reasonable opportunity to protect his property interests prior to his expulsion."[234]

Similarly, with regard in particular to migrant workers, paragraph 18 (sect. VI) of the Migration for Employment Recommendation (Revised), adopted by the General Conference of the International Labour Organization on 1 July 1949, reads as follows:

> "(1) When a migrant for employment has been regularly admitted to the territory of a Member, the said Member should, as far as possible, refrain from removing such person or the members of his family from its territory on account of his lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.
>
> ...
>
> (2) Any such agreement should provide:
>
> "(c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property" (emphasis added).

As has been pointed out, such considerations are taken into account in national laws, which, *inter alia*, may afford the alien a reasonable opportunity to settle any claims for wages or other entitlements before his or her departure or provide for the necessary actions to be taken in order to ensure the safety of the alien's property while the alien is detained pending deportation.[235] More generally, the need to protect the property of aliens subject to expulsion is also taken into account, to varying degrees and in different ways, by the laws of a number of States.[236]

(4) According to draft article 30, an alien must be guaranteed the free disposal of his or her property "in accordance with the law". This clarification should not be interpreted as allowing the expelling State to apply laws that would have the effect of denying or limiting arbitrarily the free disposal of property. However, it takes sufficient account of the interest that the expelling State may have in limiting or prohibiting, in accordance with its own laws, the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question or that might be the proceeds of criminal or other unlawful activities. Furthermore, the clarification that the alien should be allowed to dispose freely of his or her property, "even from abroad", is intended to address the specific needs, where applicable, of an alien who has already left the territory of the expelling State because of an expulsion decision concerning him or her. That point was taken into account by the International Court of Justice in its 2010 judgment in the *Diallo* case, even although the Court ultimately found that in the case in question Mr. Diallo's direct rights as associé had not been violated by the Democratic Republic of the Congo, because "no evidence [had] been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*".[237]

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[234] *Rankin v. The Islamic Republic of Iran*, Award of 3 November 1987, *Iran-US Claims Tribunal Reports*, vol. 17, p. 147, para. 30 e.

[235] See the above-cited memorandum by the Secretariat (A/CN.4/565), para. 714.

[236] For an overview, see *ibid.*, para. 481.

[237] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 121. For an analysis of the aspects of the judgment

(5) It is understood that the rules set forth in draft article 30 are without prejudice to the right any State has to expropriate or nationalize the property of an alien, in accordance with the applicable rules of international law.

(6) The issue of the property rights of enemy aliens in time of armed conflict is not specifically addressed in draft article 30, since the Commission's choice, as mentioned in the commentary to draft article 10, is not to address aspects of the expulsion of aliens in time of armed conflict. It should, however, be noted that the issue of property rights in the event of armed conflict was the subject of extensive discussions in the Eritrea- Ethiopia Claims Commission.[238]

Article 31
Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law entails the international responsibility of the expelling State.

Commentary

(1) It is undisputed that an expulsion in violation of a rule of international law entails the international responsibility of the expelling State for an internationally wrongful act. In this regard, draft article 31 is to be read in the light of Part Two of the articles on the responsibility of States for internationally wrongful acts.[239] Part Two sets out the content of the international responsibility of a State, including in the context of the expulsion of aliens.[240]

(2) The fundamental principle of full reparation by the State of the injury caused by an internationally wrongful act is stated in article 31 of the articles on State responsibility,[241] while article 34[242] sets out the various forms of reparation, namely restitution (article 35), compensation (article 36) and satisfaction (article 37). The jurisprudence on reparation in cases of unlawful expulsion is particularly abundant.[243]

(3) Restitution, in the form of the return of the alien to the expelling State, has sometimes been chosen as a form of reparation. In this regard, the first Special Rapporteur on international responsibility, Mr. García Amador, stated: "In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the

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concerning property rights, see the Special Rapporteur's seventh report on expulsion of aliens (A/CN.4/642), paras. 33–40.

[238] Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, decision of 17 December 2004, paras. 124–129, 133, 135–136, 140, 142, 144–146 and 151–152, and *ibid.*, *Ethiopia's Claim 5*, decision of 17 December 2004, paras. 132–135; United Nations, *Reports of International Arbitral Awards*, vol. XXVI, pp. 195–247 and 249–290. See, in this regard, the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 933–938.

[239] See *Yearbook ... 2001*, vol. II (Part Two), pp. 86–116.

[240] See para. (5) of the general commentary to the Commission's articles on the responsibility of States for internationally wrongful acts; *Yearbook ... 2001*, vol. II (Part Two), p. 32.

[241] Article 31 reads as follows: "Article 31 – Reparation: 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

[242] Article 34 reads as follows: "Article 34 – Forms of reparation: Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

[243] See the above-cited memorandum by the Secretariat (A/CN.4/565), paras. 960 to 977, as well as the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 188 to 204.

return of the expelled alien."[244] He was referring, in this context, to the *Lampton* and *Wiltbank* cases (concerning two United States citizens expelled from Nicaragua in 1894) and the case of four British subjects also expelled from Nicaragua.[245] The right of return in case of unlawful expulsion has been recognized by the Inter-American Commission on Human Rights in connection with the arbitrary expulsion of a foreign priest.[246]

(4) Compensation is a well-recognized means of reparation for the injury caused by an unlawful expulsion to the alien expelled or to the State of nationality. It is not disputed that the compensable injury includes both material and moral damage.[247] A new approach was taken by the Inter-American Court of Human Rights to the right to reparation by including interruption of the life plan in the category of harm suffered by victims of violations of human rights.[248]

Damages have been awarded by a number of arbitral tribunals to aliens who had been victims of unlawful expulsions. In the *Paquet* case, the umpire held that, given the arbitrary nature of the expulsion, the Government of Venezuela should pay Mr. Paquet compensation for the direct damages he had suffered:

> "… the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order;
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> That, besides, the sum demanded does not appear to be exaggerated:

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[244] International responsibility: sixth report by F.V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Reparation of the injury), *Yearbook … 1961*, vol. II, A/CN.4/134 and Add.1, para. 99.

[245] *Ibid.*, para. 99, footnote 159. These cases are mentioned by John Bassett Moore in *A Digest of International Law*, Washington, Government Printing Office, vol. IV, 1906, pp. 99–101. Lampton and Wiltbank had been expelled by the Government of Nicaragua and then allowed to return to Nicaragua at the request of the United States. As for the four British subjects, Great Britain had demanded "the unconditional cancellation of the decrees of expulsion" and Nicaragua had replied that "there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned".

[246] "The Inter-American Commission on Human Rights resolves: ... 3. To recommend to the Government of Guatemala: (a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; (b) that it investigate the acts reported and punish those responsible for them; and (c) that it inform the Commission in 60 days on the measures taken to implement these recommendations" (Inter-American Commission on Human Rights, Resolution 30/81, Case 7378 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54, doc. 9, rev. 1, 16 October 1981).

[247] See, on this issue, the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), paras. 191 to 193. See also, in this connection, the Judgment of 19 June 2012 rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case, which is discussed in para. (6) below.

[248] *Ibid.* (A/CN.4/625/Add.2), paras. 194 and 195. The Special Rapporteur cited, in this regard, the judgments rendered in the following cases: *Loayza Tamayo v. Peru*, Judgment of 27 November 1998 (Reparations and costs), Series C, No. 42, paras. 144–154; *Cantoral Benavides*, Judgment of 3 December 2001 (Reparations and costs), Series C, No. 88, paras. 60 and 80; *Gutiérrez Soler v. Colombia*, Judgment of 12 September 2005 (Merits, reparations and costs), Series C, No. 132, paras. 87–89.

> Decides that N.A. Paquet is entitled to an indemnity of 4,500 francs."[249]

Damages were also awarded by the umpire in the *Oliva* case to compensate the loss resulting from the breach of a concession contract, although these damages were limited to those related to the expenditures which the alien had incurred and the time he had spent in order to obtain the contract.[250] Commissioner Agnoli had considered that the arbitrary nature of the expulsion would by itself have justified a demand for damages:

> "[A]n indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity."[251]

In other cases, it was the unlawful manner in which the expulsion had been carried out (including the duration and conditions of a detention pending deportation) that gave rise to compensation. In the *Maal* case, the umpire awarded damages to the claimant because of the harsh treatment he had suffered. Given that the individuals who had carried out the deportation had not been punished, the umpire considered that the sum awarded needed to be sufficient in order for the State responsible to "express its appreciation of the indignity" inflicted on the claimant:

> "The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. [...] And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation. In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of the payment; and judgment may be entered accordingly."[252]

In the *Daniel Dillon* case, damages were awarded to compensate maltreatment inflicted on the claimant due to the duration and conditions of his detention:

> "The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the

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[249] *Paquet* case, Belgium-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 325.

[250] *Oliva* case, Italy-Venezuela Mixed Claims Commission, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 607 to 609 (Ralston, umpire), containing details about the calculation of damages in the particular case.

[251] *Oliva* case, *ibid.*, p. 602 (Agnoli, commissioner).

[252] *Maal* case, Netherlands-Venezuela Mixed Claims Commission, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 732 and 733 (Plumley, umpire).

> purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at $2,500, U.S. currency, without interest."[253]

In the *Yaeger* case, the Iran-United States Claims Tribunal awarded the claimant compensation for (1) the loss of personal property that he had to leave behind because he had not been given sufficient time to leave the country;[254] and (2) for the money seized at the airport by the "Revolutionary Komitehs".[255]

In some instances, the European Court of Human Rights has awarded a sum of money as compensation for non-pecuniary damages resulting from an unlawful expulsion. In *Moustaquim v. Belgium*, the Court disallowed a claim for damages based on the loss of earnings resulting from an expulsion in violation of article 8 of the European Convention on Human Rights, citing the absence of a causal link between the violation and the alleged loss of earnings. However, the Court awarded the applicant, on an equitable basis, 100,000 Belgian francs as a compensation for non-pecuniary damages for the period that he had to live away from his family and friends, in a country where he had no ties.[256] In the *Čonka v. Belgium* case, the European Court of Human Rights awarded the sum of 10,000 euros to compensate non-pecuniary damages resulting from a deportation which had violated articles 5, paragraphs 1 and 4, of the European Convention on Human Rights (right to liberty and security), article 4 of Protocol No. 4 to that Convention (prohibition of collective expulsion), as well as article 13 of the Convention (right to an effective remedy) taken in conjunction with article 4 of Protocol No. 4.[257]

(5) Satisfaction as a form of reparation is addressed in article 37 of the articles on State responsibility. It is likely to be applied in the case of an unlawful expulsion, particularly in situations where the expulsion decision has not yet been executed. In such cases, the European Court of Human Rights considered that a judgment determining the unlawfulness of the expulsion order was an appropriate form of satisfaction and therefore abstained from awarding non-pecuniary damages. Attention may be drawn in this respect to *Beldjoudi v. France*,[258] *Chahal v. United Kingdom*[259] and *Ahmed v. Austria*.[260] It is relevant to recall in

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[253] *Daniel Dillon (United States of America) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 369.

[254] *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 107 to 109, paras. 51–59.

[255] *Ibid*., p. 110, paras. 61–63.

[256] *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, paras. 52 to 55.

[257] *Čonka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 42.

[258] *Beldjoudi v. France*, Judgment (Merits and Just Satisfaction), 26 March 1992, Application No. 12083/86, para. 86: "The applicants must have suffered non-pecuniary damages, but the present judgment provides them with sufficient compensation in this respect." The Court added that there would have been a violation of article 8 of the Convention "if the decision to expel Mr. Beldjoudi [had been] implemented" (operative para. 1).

[259] *Chahal v. United Kingdom, Judgment (Merits and Just Satisfaction)*, 15 November 1996, Application No. 22414/93, para. 158: "In view of its decision that there has been no violation of Article 5, para. 1 ..., the Court makes no award for non-pecuniary damages in respect of the period of time Mr. Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5, para. 4, and 13 constitute sufficient just satisfaction."

[260] *Ahmed v. Austria, Judgment (Merits and Just Satisfaction)*, 17 December 1996, Application No.

this connection that the Commission itself, in its commentary to article 37 on State responsibility, stated: "One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal."[261] Again with respect to satisfaction as a form of reparation, it should be noted that the Inter-American Court of Human Rights does not limit itself to awarding compensation to victims of unlawful expulsion, considering that "the reparations that must be made by the State necessarily include effectively investigating the facts [and] punishing all those responsible".[262]

(6) The question of reparation for internationally wrongful acts related to the expulsion of an alien was recently addressed by the International Court of Justice in its judgment of 30 November 2010 in the *Ahmadou Sadio Diallo* case:

> "Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility."[263]

After recalling the legal regime governing reparation, based on the principle, established by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów*, that the reparation must, as far as possible, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[264] and the principle, recently recalled in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, that the reparation can take "the form of compensation or satisfaction, or even both",[265] the Court stated:

> "In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation."[266]

Subsequently, on 19 June 2012, the Court handed down a judgment on the question of compensation payable by the Democratic Republic of the Congo to the Republic of Guinea.[267] It awarded the Republic of Guinea compensation of $85,000 for the non-material

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25964/94. The Court disallowed a claim for compensation for loss of earnings because of the lack of a causal connection between the alleged damage and the Court's conclusion with regard to article 3 of the Convention (para. 50). The Court then stated: "The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect" (para. 51). The Court then held: "... for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented" (operative para. 2).

[261] Para. (6) of the commentary to art. 37; *Yearbook ... 2001*, vol. II (Part Two), pp. 106–107.

[262] *Bámaca-Velásquez v. Guatemala*, Judgment of 22 February 2002, (Reparations), paras. 73 and 106.

[263] Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 160.

[264] Judgment No. 13 (Merits), 1928, *P.C.I.J. Series A, No. 17*, p. 47.

[265] Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 273.

[266] Judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 161.

[267] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 19 June 2012 (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea).

injury suffered by Mr. Diallo because of the wrongful acts attributable to the Democratic Republic of the Congo,[268] and, on basis of equitable considerations, awarded $10,000 dollars to compensate for Mr. Diallo's alleged loss of personal property.[269] The Court, however, rejected, for lack of evidence, requests for compensation for the loss of remuneration that Mr. Diallo's had allegedly suffered during his detention and following his unlawful e[illegible][270] The Court in its judgment addressed in a general way several points regardin[illegible] conditions and manner of compensation, including the causal link between the unlawful acts and the injury, the assessment of the injury — including the non-material injury — and the evidence for the latter.

Article 32
Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

Commentary

(1) Draft article 32 refers to the institution of diplomatic protection, for which the legal regime is well established in international law.[271] It is undisputed that the State of nationality of an alien subject to expulsion can exercise diplomatic protection on behalf of its national, subject to the conditions specified by the rules of international law. Those rules are essentially reflected in the articles on diplomatic protection adopted by the Commission in 2006, the text of which was essentially annexed by the General Assembly to its resolution 62/67 of 6 December 2007.[272]

(2) In its decision of 2007 regarding the preliminary objections in the *Diallo* case, the International Court of Justice reiterated, in the context of the expulsion of aliens, two essential conditions for the exercise of diplomatic protection, namely the nationality link and the prior exhaustion of domestic remedies.[273]

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[268] *Ibid.*, paras. 18–25.

[269] *Ibid.*, paras. 26–36 and 55.

[270] *Ibid.*, paras. 37–50.

[271] See the second addendum to the Special Rapporteur's sixth report (A/CN.4/625/Add.2), paras. 170–175.

[272] For the text of the articles on diplomatic protection and the commentaries thereto, see the report of the Commission on the work of its fifty-eighth session (2006), *Documents officiels de l'Assemblée générale, soixante et unième session, Supplement No. 10* (A/61/10), para. 50.

[273] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, para. 40.

Chapter V
Protection of persons in the event of disasters

A. Introduction

47. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.

48. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, and identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

49. The Commission considered, at its sixty-first session (2009), the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

50. At its 3029th meeting, on 31 July 2009, the Commission took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (A/CN.4/L.758).

51. At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 to 5 at the 3057th meeting, held on 4 June 2010. The Commission further had before it the third report of the Special Rapporteur (A/CN.4/629) providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, and a consideration of the question of the responsibility of the affected State. Proposals for the following three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).

52. At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 to 9, at the 3102nd meeting, held on 11 July 2011. The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1) containing, *inter alia*, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected

State not to arbitrarily withhold its consent) and 12 (Right to offer assistance). The Commission provisionally adopted draft articles 10 and 11 at the 3116th meeting, held on 2 August 2011, but was unable to conclude its consideration of draft article 12 owing to a lack of time.

B. Consideration of the topic at the present session

53. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652) providing an overview of the views of States on the work undertaken by the Commission thus far, a brief discussion of the Special Rapporteur's position on the Commission's question in Chapter III.C of its 2011 annual report,[274] as well as a further elaboration of the duty to cooperate. The report also contained a discussion of the conditions for the provision of assistance and the question of the termination of assistance. Proposals for the following three further draft articles were made in the report: draft articles A (Elaboration of the duty to cooperate), 13 (Conditions on the provisions of assistance) and 14 (Termination of assistance).

54. The Commission considered the fifth report at its 3138th to 3142nd meetings, from 2 to 6 July 2012.

55. At its 3142nd meeting, on 6 July 2012, the Commission referred draft articles A, 13 and 14 to the Drafting Committee.

56. At its 3152nd meeting, on 30 July 2012, the Commission received the report of the Drafting Committee and took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Draft Committee (A/CN.4/L.812).[275]

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[274] See para. 57 below.

[275] The draft articles provisionally adopted by the Drafting Committee read as follows:

Article 5 *bis*
Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

...

Article 12
Offers of assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Article 13
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 14
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

1. Introduction by the Special Rapporteur of the fifth report

57. In introducing his fifth report, the Special Rapporteur recalled the generally positive reception of Governments in the Sixth Committee to the draft articles adopted by the Commission thusfar. He also placed on record his position as regards the question posed by the Commission in chapter III.C of its 2011 report, concerning whether the duty of States to cooperate with the affected State includes a duty to provide assistance when requested by the affected State. He indicated that an analysis of existing law and practice revealed that the provision of assistance from one State to another was premised on the voluntary character of the action of the assisting State. The Special Rapporteur observed that many States in the Sixth Committee had, in their statements, answered the Commission's question in the negative, mainly arguing that such a duty had no basis in existing international law.

58. The Special Rapporteur recalled that member Governments had called on the Commission to elaborate further on the duty of cooperation, which was the subject of draft article 5. He noted that cooperation played a basic role in the provision of relief. Seen from the larger perspective of public international law, to be legally and practically effective the duty to cooperate in the provision of disaster relief had to strike a balance between three important aspects. First, such a duty could not intrude into the sovereignty of the affected State. Second, the duty had to be imposed on assisting States as a legal obligation of conduct. Third, the duty had to be relevant and limited to disaster relief assistance, by encompassing the various specific elements that normally make up cooperation on the matter. From the diversity of existing international instruments and texts, it could be deduced that the duty to cooperate covered a great diversity of technical and scientific activities, as described *in extenso* in his report. He thus felt it appropriate to include in the draft articles a further draft article elaborating on the duty to cooperate, while leaving open the question of its eventual location, i.e., either as a stand-alone provision or as an additional paragraph to draft article 5. His proposal for a new draft article A[276] was modelled on draft article 17, paragraph 4, dealing with cooperation in the case of emergencies, of the draft articles on the law of transboundary aquifers of 2008, which was, in turn, modelled on article 28 of the Convention on the Law of Non-Navigational Uses of

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(a) Civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) Goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 15
Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

[276] Draft article A read as follows:

"Draft article A
Elaboration of the duty to cooperate

States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance."

International Watercourses, 1997. He noted that the first four categories of cooperation he had identified were also referred to in draft article 17, paragraph 4.

59. Chapter V of the Special Rapporteur's fifth report was dedicated to the question of the conditions that an affected State may place on the provision of assistance. The issue was considered from three, concurrent, perspectives: compliance with national laws; identifiable needs and quality control; and limitations on conditions under international law and national law. It was noted that the principal conclusions reached under each aspect were implied in several draft articles already adopted by the Commission. In particular, underlying the three perspectives, was the fundamental principle found in draft article 11, paragraph 1, according to which the provision of external assistance was subject to the consent of the affected State. The power of the affected State to establish the conditions which the offer of assistance must meet was the corollary to the basic role of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory, in accordance with draft article 9.

60. In the view of the Special Rapporteur, assisting actors were required to provide assistance in compliance with the national law of the affected State. However, the right to condition the provision of assistance on compliance with national law was not absolute. The affected State had a duty to facilitate the provision of prompt and effective assistance, under its sovereign obligations to its population. States had an obligation to assist in ensuring compliance with national law and an obligation to examine whether the applicability of certain provisions of national law must be waived in the event of a disaster. The latter element related, *inter alia*, to: the grant of privileges and immunities; visa and entry requirements, customs requirements and tariffs; and questions of quality and freedom of movement. After reviewing existing practice, the Special Rapporteur was of the view that, rather than a strict and absolute requirement of waivers in a disaster, the affected State should consider the reasonableness of the waiver in light of its obligations to provide prompt and effective assistance and to protect its population. In his view, it was sufficient to indicate that the affected State may impose conditions on the provision of assistance, subject to their compliance with national and international law, and accordingly proposed draft article 13[277] to that effect.

61. The Special Rapporteur indicated that the duty of cooperation further implied the duty of the affected State and that of the assisting actors to consult each other with a view to determining the duration of the period of assistance. Such consultation could take place before the assistance was provided or during the period of the provision of assistance, by the initiative of one or the other party. He had thus proposed draft article 14 to that effect.[278]

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[277] Draft article 13 read as follows:

> **"Draft article 13**
> **Conditions on the provision of assistance**
>
> The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law."

[278] Draft article 14 read as follows:

> **"Draft article 14**
> **Termination of assistance**
>
> The affected State and assisting actors shall consult with each other to determine the duration of the external assistance."

2. Summary of the debate

(a) General remarks

62. In commenting on the approach taken by the Commission in the draft articles previously adopted, a view was expressed indicating a preference for not analyzing the relationship between the affected State and third States in terms of rights and duties, but rather from the perspective of cooperation. It was observed that the vast majority of cases did not involve any *mala fides* on the part of the affected State, and that in the few extreme cases where States did withhold consent arbitrarily, it was unlikely that a right-duty approach would have been of assistance to persons affected by disasters. Furthermore, some members noted that the existence of "rights" or "duties" in this area of the law was not supported by State practice. It was also considered doubtful whether it was appropriate to refer to such concepts as applying to non-State actors. Likewise, the view was expressed that the inability to specify legal consequences for failure to uphold a duty, for example not to arbitrarily withhold consent, suggested that the concept of duty being applied lacked content.

63. According to another view, the function of law, including international law, was, inter alia, to regulate those situations where there existed possible violations of accepted rules and principles. One could not, according to this view, discount the importance of legal rules in drawing the distinction between acceptable and unacceptable actions, particularly in the context of States acting with *mala fides*. Furthermore, the view was expressed that the articulation of minimum rights and duties should not *a priori* be viewed as inhibiting the encouragement of voluntary cooperation.

64. A doubt was expressed as to the usefulness of the adoption of draft articles in the form of a convention. According to another view, by their nature the draft articles implied the need for more specific implementing legislation under national law. It was suggested that the Commission keep this in mind when turning to discussing the eventual form of the draft articles, which could include a framework convention or a set of guiding principles.

65. It was proposed that the Commission consider formulating a model instrument for humanitarian relief operations in the event of disasters patterned on a Status of Forces Agreement (SOFA) which could be annexed to the draft articles and which could serve a practical purpose. While several speakers spoke in favour of dealing with some of the practical aspects of the topic, others expressed doubts about the feasibility of the proposal.

(b) Comments on draft article A

66. General support was expressed for the proposal to further elaborate on the duty of cooperation within the draft articles. At the same time, it was suggested that greater precision be given to the draft article. For example, it was suggested that reference also be made to financial assistance, as one of the ways in which States and other actors could provide assistance. It was also suggested that a reference be included to the assisting actor consulting with the affected State in order to ascertain what kind of assistance was required.

67. The view was expressed that draft article A did not itself deal with the duty to cooperate, which existed on the level of principle, but rather with the more operational duty to provide cooperation or assistance, in the forms listed. Accordingly, the provision was also linked to draft article 12. It was pointed out that the use of the word "shall" seemed to contradict the general position that no legal obligation to provide assistance existed. The concern was also expressed that the language of the draft article appeared to limit the discretion of assisting States to determine the nature of assistance to be provided.

68. According to a further view, it was not appropriate to speak in terms of legal obligations when addressing the duty to cooperate, given its general and discretionary

nature. Greater clarity was also called for as regards on which actors the duty in the draft article was being imposed. Doubts were also expressed as to the feasibility of imposing obligations on non-State actors in the draft articles.

69. It was suggested that account needed to be taken of the fact that the extent of personal damage inflicted by a disaster was often the result of poverty, the lack of safe and adequate housing and access to drinkable water and sanitation.

(c) Comments on draft article 13

70. The view was expressed that while there existed some conditions that could not be imposed on the provision of assistance, as a general rule the affected State could subject the provision of assistance to whatever conditions it deemed necessary. Agreement was also expressed by some members with the view that, in determining the extent of appropriate conditions imposed, regard should be had to the principles of State sovereignty and non-intervention, while at the same time taking into account the responsibilities of States to protect persons on their territory. As such, any condition imposed by the affected State should be reasonable and should not undermine the duty to protect, including the duty to facilitate assistance, nor lead to the arbitrary withholding of consent to external assistance (article 11, paragraph 2). It was also suggested that it had to be clarified that the conditions imposed by the affected State for the provision of assistance should comply first and foremost with national and international human rights norms. It was further suggested that reference be made to the need to adopt a gender perspective, so as to ensure greater effectiveness of the assistance being provided.

71. It was suggested that the draft article be more detailed so as to include references to the various elements dealt with in the report of the Special Rapporteur. A further view was that the relative lack of detail in the provision the Special Rapporteur's draft gave rise to the risk of unwarranted broad interpretations by affected States of the range of conditions that they could apply to the provision of assistance.

72. The view was expressed that the key issue was obtaining the necessary exemptions from national law in order to allow for the prompt provision of assistance, and it was suggested that the provision be more specific on that point. Agreement was expressed with the Special Rapporteur's suggestion that the affected State consider the reasonableness of waiving its internal requirements in each circumstance with a view to ensuring prompt and effective assistance. A further view was that it was not easy to ask States simply to waive their domestic legislation, which could give rise to difficulties under their respective constitutional systems, and raised questions about the rule of law. In terms of a further suggestion, it could be recommended that States specifically anticipate in their legislation the possibility of the waiver of internal requirements in the case of disasters.

(d) Comments on draft article 14

73. While several members welcomed the inclusion of draft article 14, which would in their view ensure greater legal certainty in the implementation of assistance, others questioned its utility and recommended that it be deleted or replaced with a "without prejudice" clause. The concern was expressed that the provision seemed to condition termination on the existence of consultation. It was suggested that a more flexible provision was needed, so as to reflect the various realities that could arise. It was also suggested that the provision more explicitly acknowledge that the duration of assistance was ultimately a matter for decision by the affected State. Other members cautioned against an approach that recognized a uniform and unilateral right of affected States to terminate the assistance being provided to them, as it could unnecessarily affect the rights of affected persons.

74. Suggestions for improvement included specifying that, upon termination, the respective parties should cooperate to allow for the repatriation of goods and personnel. It was also suggested that reference could be made to the need for a procedure for termination, to be agreed upon by the affected State and assisting actors.

3. Concluding remarks of the Special Rapporteur

75. The Special Rapporteur cautioned against reopening draft articles that had already been adopted by consensus during the first reading. In his view, the comments and observations made on previously adopted draft articles were more appropriately to be taken into account during the second reading of the draft articles.

76. The Special Rapporteur concurred with the views expressed during the debate that draft article 13 could benefit from further detail, in order to have greater practical value, and agreed to making drafting suggestions in the Drafting Committee for such improvements.

77. As for the relationship between draft article 5 and draft article A, the Special Rapporteur recalled that draft article 5, in general terms, set forth the duty to cooperate in the specific context of disasters. Draft article A indicated the principal areas in which such cooperation should take place. To his mind, the misgivings raised by some members were more terminological in nature and could be remedied in the Drafting Committee.

78. As regards the proposal to negotiate a model SOFA for disasters, he noted that the model SOFA prepared by the United Nations Secretariat envisaged the activities of the military forces of States for peacekeeping operations. However, such model agreement to be prepared by the Commission in the context of disasters would have to include the activities of non-military actors. He noted that the United Nations model SOFA was very detailed, as was the case with similar texts being developed in other fora, and national models for civil defence. While the usefulness of such documents could not be denied, in his view, such an endeavour would exceed the scope of this topic as it was approved by the Commission.

79. As to the question of the final form of the draft articles, he recalled that the approach of developing draft articles was simply the usual practice of the Commission, and was without prejudice to the final form in which they were going to be adopted. He remained open-minded on the matter and preferred to defer it until a later stage of consideration.

80. The Special Rapporteur further indicated his intention to spend most of his next report on disaster risk reduction, including the prevention and mitigation of disasters. That report might extend to the protection of humanitarian assistance personnel. He also planned to propose a draft article on the use of terms, as well as other miscellaneous provisions.

C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission

81. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.[279]

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[279] For the commentaries to draft articles 1 to 5, see *Official Records of the General Assembly, Sixty-fifth Session* (A/65/10), para. 331. For the commentaries to draft articles 6 to 11, see *Official Records of the General Assembly, Sixty-sixth Session* (A/66/10), para. 289.

Protection of persons in the event of disasters

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4
Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Article 5
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Article 6
Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 10
Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 11
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Chapter VI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

82. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[280] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[281]

83. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[282] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[283]

B. Consideration of the topic at the present session

84. The Commission, at its 3132nd meeting, on 22 May 2012, appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission.

85. The Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/654). The Commission considered the report at its 3143rd to 3147th meetings, on 10, 12, 13, 17 and 20 July 2012.

1. Introduction by the Special Rapporteur of the preliminary report

86. The preliminary report analyzed the Commission's work thus far, providing *inter alia* an overview of the work by the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly. It also addressed the issues about which there was no consensus and which ought to be considered during the present quinquennium, focusing in particular on the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*, the distinction and the relationship between the international responsibility of the State and the international responsibility of the individual and their implications for immunity, the scope of immunity *ratione personae* and immunity *ratione materiae*, including possible exceptions, and the procedural issues related to immunity. The report also offered a suggested workplan.

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[280] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[281] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[282] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[283] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

87. In her introduction of the report, the Special Rapporteur underlined that the report was "transitional" in nature as it took into account the work carried out by the previous Special Rapporteur in his three reports and by the Secretariat in its memorandum (which would continue to be useful for the future work of the Commission), as well as the progress in the debates of the Commission and the Sixth Committee, while seeking to identify issues for consideration during the present quinquennium in a way that would foster a structured debate and provide an effective response to the myriad of issues raised by the topic. In this connection, the Special Rapporteur focused on a number of methodological aspects. First, it was underscored that the topic was complex and politically sensitive. Despite three reports by the previous Special Rapporteur and debates in the Commission and the Sixth Committee, there were still a variety of perspectives attendant to the topic and many points of difference requiring a fresh approach while bearing in mind the valuable work done previously. Secondly, it was stressed that the mandate of the Commission covered the promotion of both the progressive development of international law and its codification. In that regard, it was within the working methods of the Commission to look at both *lex lata* and *lex ferenda*. The topic was a classical topic in international law, which, however, had to be considered in light of new challenges and developments. Thirdly, it was underscored that in the treatment of the topic it was necessary to take a systemic approach, bearing in mind that the product to be elaborated by the Commission would have to be incorporated into and form part of the international legal system. This meant that it was crucial to take a systemic approach that interrogated the various relationships between the rules relating to immunity of State officials and structural principles and essential values of the international community and international law, including those seeking to protect human rights and combat impunity. In this regard, there was a need to take into account a balancing of interests. Fourthly, there was need to have a focused and structured debate on the various issues, singling out clearly identified blocks of basic questions to be discussed one at a time, even though it was recognized that the substantive issues appertaining to the topic were cross-cutting and interrelated. It was pointed out that the proposed work plan contained in the preliminary report was suggested with this goal in mind.

88. The Special Rapporteur also highlighted a number of substantive questions which it was considered crucial to address in unravelling the issues surrounding the topic. The first was the distinction between immunity *ratione personae* and immunity *ratione materiae*. Although the distinction was well made doctrinally, it was necessary to consider further the consequences that may be drawn from such a distinction and its impact. Secondly, it was necessary to clarify the functional dimension of immunity to ensure that it did not conflict unnecessarily with other principles and values of the international community. Thirdly, it would be necessary to determine the beneficiaries of immunity *ratione personae* and whether it would be appropriate to establish a list, open or closed. Fourthly, it would be appropriate to determine the scope of "official act" for purposes of immunity, including the implications therefore in relation to the responsibility of the State for an internationally wrongful act and the international criminal responsibility of the individual. Fifthly, it would be necessary to analyze whether there were any possible exceptions to immunity and the applicable rules in relation thereto. Sixthly, it would be of vital importance to consider the question of international crimes in light of the general question of the essential values of the international community; and finally it would be appropriate to consider the procedural aspects pertaining to the exercise of immunity. The Special Rapporteur recalled that the previous Special Rapporteur had addressed those aspects to a large extent. However, since a consensus had not been reached on them, it would be useful for the Commission to consider the controversial issues from a fresh perspective. To that effect, the Special Rapporteur indicated that she was willing to present draft articles as early as in her next report.

2. Summary of the debate

(a) General remarks

89. Members welcomed the preliminary report of the Special Rapporteur and its focus on methodological, conceptual and structural aspects, with a view to setting out a roadmap of future work of the Commission. Members joined the Special Rapporteur in acknowledging the scholarly and outstanding contribution of Mr. Roman A. Kolodkin, as previous Special Rapporteur, and whose work, together with the memorandum by the Secretariat, would continue to be useful in the efforts of the Commission.

90. Members also recalled the complexity of the topic and the political sensitivities that it engendered for States. In this connection, some members cautioned that it was important to ensure that any methodological and conceptual approach taken would be neutral in nature and would not prejudice discussion on matters of substance. The point was also made that a change in the Special Rapporteur did not necessarily lend itself to a radical change in approach.

91. Some other members expressed the hope that the outcome of the work of the Commission would contribute positively to the fight against impunity and not erode the achievements made thus far in that area.

(b) Methodological considerations

(1) Progressive development of international law and its codification

92. Some members considered the distinction between progressive development of international law and its codification as particularly important in the consideration of the present topic. It was suggested that, where possible, the Commission should distinguish between what was codification, and proposals to States for progressive development of the law; this was especially the case because this area of the law was applied chiefly by domestic courts, in cases which were politically sensitive. Such differentiated specification would help to provide guidance to such courts.

93. Moreover, since in the consideration of the present topic the Commission would most probably be confronted with issues concerning "evolving" aspects of international law, it was countenanced that it should, in the interest of transparency, analytically distinguish determinations constituting *lex lata* from proposals *de lege ferenda*.

94. Some members concurred in the view of the Special Rapporteur that, in the consideration of the topic, it would be useful to focus, initially, on considerations that reflect *lex lata*, and then at a later stage take into account any propositions *de lege ferenda*.

95. Some other members, on the other hand, underlined that it was essential that the difference between codification and progressive development should not be transformed into a contrived opposition between a law that was conservative and a law that was progressive, or to conflate *lex lata* with codification or progressive development with *lex ferenda*. When the Commission engages in an exercise in the progressive development of the law it does more than simply identify what it thinks the law is or should be; it proceeds on the basis of an assessment of the practice of States even though the law may not have been sufficiently developed or is unclear, or the matter remains unregulated. Progressive development of international law was as much the mandate of the Commission as codification. The entire process was more subtle and seamless than marked by a clear divide.

96. In this connection, it was doubted that there was a compelling argument for drawing a sharp distinction, for purposes of methodology, between the codification and progressive

development of international law. It was recalled that, in the practice of the Commission, there was no such differentiation drawn between codification and progressive development; it was probably a distinction borne out by the rhetoric rather than practice, even though occasionally in the commentary on draft articles an indication is given that the direction taken by the Commission on a particular issue represents progressive development.

97. What was considered critical for the Special Rapporteur was to undertake an objective analysis of the relevant evidence of practice, the doctrine and any emerging trends, in light of relevant values and principles of contemporary international law and, on that basis, propose as appropriate draft articles for the topic.

(2) Systemic approach

98. Some members viewed the systemic approach proposed by the Special Rapporteur, albeit seemingly valuable, as abstract and deductive. It was sharply contrasted with a practice-oriented and inductive approach which was viewed as best suited to reaching solid determinations of the law, regardless of whether the aim was to identify *lex lata* or proposing developments *de lege ferenda*. It was emphasized that even abstract categorizations had empirical foundations and must be justified as such.

99. On the other hand, it was cautioned that there was no need to be hasty in passing judgment on what was entailed by a systemic approach. It was important that the Commission exercise its legal choices taking into account the need to find a balance between the respect for sovereignty and the concern for the vulnerable, including victims of egregious crimes. It was essential that the Commission be sensitive to the value-laden nature of contemporary international law, which, while continuing to respect sovereignty and concepts associated with it such as immunity, also favoured legal humanism and recognized the existence of an international society.

(3) Trends in international law

100. Some members pointed out that the Commission should be cautious with respect to the contention that a "trend" existed to limit immunities before national jurisdictions and their scope. Indeed, it was recalled that, in *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*,[284] the International Court of Justice had rejected the contention of Italian courts that a trend existed in international law according to which the immunity of the State was in the process of being restricted in the application of the territorial tort principle for *acta jure imperii*, when in fact there was a contrary trend reaffirming immunity before national criminal jurisdictions. Moreover, it was noted that the *Pinochet* decision, rendered in 1999, had not been widely followed. Some other members referred to the Joint Separate Opinion by Judges Higgins, Kooijmanns and Buergenthal in the *Arrest Warrant* case,[285] in which they seemed to indicate that, at best, no rule exists in relation to immunity *ratione materiae* in terms of the most serious international crimes and that a trend pointing to the absence of immunity may exist.

(4) Values of the international community

101. On the related question of values of the international community, some members drew attention to the possible difficulty of translating "values" into operational rules and principles of international law. It was opined that giving effect to other principles and

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[284] Judgment of 3 February 2012.

[285] See *Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, I.C.J. Reports 2002*, Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal, para. 85.

values of the international community, which were also in the process of incorporation into international law, in particular the value to combat impunity as suggested by the Special Rapporteur, might not be as decisive in the consideration of the topic as would the more appropriate question of how such values may be given effect. It was in this regard pointed out that the rules on immunity were themselves representative of values of the international community. If any balancing process were to take place, it would have to have a solid foundation and be undertaken and scrutinized within the framework of the general rules on the formation and evidence of customary international law.

102. An element of caution was also expressed regarding the use of terms like "system of values" as these may be construed as euphemisms intended to privilege certain values over others.

103. Some other members expressing a contrary view observed that the law did not exist in a vacuum and was not necessarily neutral. In any event, the approach proposed by the Special Rapporteur was more revealing of her intentions to proceed in a transparent manner than indicative of a radical departure from what the Commission had always done, namely to deal with the principles and values of the international community, a typical function of the law in society. Indeed, the syllabus on the topic highlights these aspects and possible approaches.[286] The central issue at the core the topic, whether to further the value of immunity in inter-State relations or to move in the direction of the value that privileges the fight against impunity, was fundamentally a debate about the principles and values of the international community.

(5) Identification of basic questions

104. It was acknowledged that the identification of basic questions for analytical review and study, taking a step-by-step approach, was a useful technique. It was however signalled that it was important to remain conscious of the interrelated and interconnected nature of certain issues between which distinctions may sought to be drawn, even if it were for analytical purposes only. This was even more important if it was recognized that immunity *ratione personae* and immunity *ratione materiae* derived from a common legal source of the rule on immunity, namely the immunity of the State. Similarly, it was pointed out that there was a close relationship between immunity in criminal and in civil matters, as developments in one area may bear on the other.

(c) Substantive considerations

105. Some members considered that while State immunity and the immunity of the State official were not identical, they originated from the same underlying premise that, as a matter of international law, it was problematic for one State to readily sit in judgment, in its own domestic courts, on another State or its officials; both the official and its State are implicated when a domestic court of another State passes such judgment. In *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice had recognized that such a claim of immunity for a government official was, in essence, a claim of immunity for the State, from which the official benefitted.[287]

106. Echoing the sentiments of the Special Rapporteur in her report, it was stressed that when addressing the substance of the topic, it may be useful to draw upon recent developments, including the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), together with separate and

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[286] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), annex A.

[287] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti. v. France.), Judgment, I.C.J. Reports*, p. 177, at para. 188.

dissenting opinions, while recognizing that it dealt with immunity of the State from civil jurisdiction.

107. In their comments, members also considered it useful to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*. Nevertheless, some members pointed to the Special Rapporteur's assertion in the preliminary report that immunity *ratione personae* and immunity *ratione materiae* had the same purpose, which was "to preserve principles, values and interests of the international community as a whole" and had as their cornerstone their "functional nature" and sought clarification on the practical significance of these propositions for the topic,[288] it being pointed out, in particular, that there was no exclusivity to the functional nature of immunity. Moreover, it was important that the functional basis be seen in the light of other principles of international law, such as sovereign equality of States and non-intervention. Some other members suggested that the two types of immunity were premised on a common rationale, notably to assure stability in inter-State relations and to facilitate continued performance of representative or other governmental functions. It was also pointed out that the rationale for the two types of immunity might not be exactly the same and it was suggested that it might be useful to examine the issue further in order to determine whether any differences in possible rationales were so fundamental as to occasion different consequences. However, some members of the Commission pointed out that both immunity *ratione personae* and immunity *ratione materiae* had a clear functional character. Some other members questioned whether the term "functional" was sufficiently clear to help resolve underlying substantive issues.

(1) Scope of the topic

108. It was recognized that the Commission had already dealt with certain aspects of immunity in respect of diplomatic and consular relations, special missions, the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the representation of States in their relations with international organizations, and jurisdictional immunity of States and their property. Accordingly, these codification efforts had to be taken into account in order to ensure coherence and harmony in the principles and consistency in the international legal order. Moreover, the point was made that the Commission should not seek to expand or reduce the immunities to which persons were already entitled as members of diplomatic missions, consular posts or special missions, or as official visitors, representatives to international organizations, or as military personnel.

109. It was also recalled that the scope of the topic, which had to be maintained as such, was immunity of State officials from foreign criminal jurisdiction. Accordingly, it was not concerned with the immunity of the State official from the jurisdiction of international criminal tribunals, nor from the jurisdiction of his or her own State, nor from civil jurisdiction. Moreover, it was not intended necessarily to address the question whether international law required a State to exercise criminal jurisdiction in certain circumstances, but rather whether a State in exercising criminal jurisdiction would have to bear in mind certain questions of immunity under international law and accord a State official such immunity as appropriate.

110. Some members considered it useful for the Special Rapporteur to undertake an analysis of jurisdictional aspects, in particular the extent to which universal jurisdiction and international criminal jurisdiction and their development bear on the topic, drawing attention to prior work of the Commission on the draft Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, the draft Code of Crimes against the

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[288] Paras. 57 and 58 of the preliminary report (A/CN.4/654).

Peace and Security of Mankind, and the establishment of the International Criminal Court. Some other members, however, recalled that even though jurisdiction and immunity, as observed in the *Arrest Warrant* case[289], were related, they were different concepts and there was probably not much to be gained from any extended treatment of jurisdictional considerations for purposes of the present topic.

111. The suggestion was also made that, since inviolability of the person was closely related to immunity, had immediate practical significance and non-compliance with it entailed the potential risk of causing damage to the relations between States, the treatment of inviolability within the topic merited consideration.

(2) Use of certain terms

112. Some members noted that the use of certain terminology to describe particular relationships, such as immunity being "absolute" or the perception of immunity in terms of an "exception", might not be helpful in elucidating the topic, when the essential question to be addressed was whether immunity existed in a given case and how far it was or should be restricted. It was stressed by some members that it was important that the Commission take a "restrictive approach" in addressing the topic and refrain from giving the impression that immunity was "absolute". It was also underlined that there was need to eschew any suggestion that the functional theory to justify immunity was in any way more inherently restrictive than the representative or other theories. It was pointed out by some members that if there had been any movement to limit immunity, such movement was "vertical" in character, a tendency which revealed itself in the establishment of international criminal justice system. At the "horizontal" level, in relations between States, the tendency was a reaffirmation of immunity.

113. It was also noted that terms like "State official" needed to be defined and that there had to be concordance in the language versions, thus assuring conveyance of the same intended meaning. It was also stated by some members that in defining an official for purposes of immunity *ratione materiae* a restrictive approach should be pursued.

(3) Immunity *ratione personae*

114. It was noted that immunity *ratione personae*, which was status based, attached to the person concerned and expired once the term of office ends, and was enjoyed by a limited number of persons. While the nature of immunity was broad in scope, it was limited *ratione temporis*.

115. It was suggested by some members that the assertion by the Special Rapporteur that State practice, doctrine and jurisprudence appeared to point to an emerging consensus on immunity *ratione personae* accruing to the *troika*, with the inclusion, in particular, of the Minister for Foreign Affairs, needed to be further explored, as should the question whether other officials beyond the *troika* had immunity *ratione personae*. Although the International Court of Justice in the *Arrest Warrant* case[290] addressed both aspects by finding as firmly established in international law that certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoyed immunities from jurisdiction in other States, both civil and criminal, that aspect of the judgment had not been without criticism by other members of the Court, in the doctrine, and, from previous debates, also among members of the Commission.

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[289] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at para. 59.

[290] *Ibid.*, at paras. 52–55.

116. Some members, however, viewed the matter as settled. While some members were amenable to accepting immunity *ratione personae* for the *troika*, and maintaining a restriction on the *troika*, some other members pointed to the possibility of broadening the scope beyond the *troika*, on account of the *dicta* in the *Arrest Warrant* case,[291] to a narrow circle of high-ranking holders of office in a State. Given the differences in the designation of officials in various States and the contemporary complexity in the organization of government, the difficulty of elaborating a list of such other high ranking officials was also recognized. In this connection, it was suggested by some members, while also acknowledging the need to be cautious about elaborating an expanded pool, that it would be appropriate for the Commission to establish the necessary criteria, which would for instance cover the *troika* and, on the basis of the guidance of the *Arrest Warrant* case,[292] other holders of high-ranking office when such immunity was necessary to ensure the effective performance of their functions on behalf of their respective States. Another possible alternative suggested was the elaboration of a modified second *tier* regime of immunity *ratione personae* for persons other than the *troika*.

117. The occasional mention that there may be exceptions to immunity from foreign criminal jurisdiction for persons enjoying immunity *ratione personae* was questioned by some members as having no basis in customary international law. It was equally doubted that it would be useful to take such an approach even as a matter of progressive development.

118. Some other members viewed the matter from the perspective that the full scope of immunity *ratione personae* was enjoyed without prejudice to the development of international criminal law.

(4) Immunity *ratione materiae*

119. It was recognized that immunity *ratione materiae*, which was conduct based, continued to subsist and may be invoked even after the expiry of the term of office of an official. Unlike immunity *ratione personae*, it encompassed a wider range of officials. It was suggested, though, that instead of attempting to establish a list of officials for the purposes of immunity *ratione materiae*, attention should be given to the act itself.

120. The importance of defining an official act was generally acknowledged as key. Some members agreed with the Special Rapporteur that it was important carefully to study the relationship between the rules on attribution for State responsibility and rules on the immunity of State officials in determining whether or not a State official was acting in an official capacity. It was viewed that there was a link between the assertion by a State of immunity and its responsibility for the conduct.[293]

121. According to some members, an act attributable to the State for the purposes of its responsibility for an internationally wrongful act, including an act which was unlawful or *ultra vires*, was to be regarded as an official act for the purposes of immunity.

122. However, the point was also made that it may be useful to reflect further upon whether immunity *ratione materiae* extended to "official acts" which were unlawful or *ultra vires*. It was suggested that, for the purposes of the present topic, the focus should be on individual criminal responsibility, based on the principle of personal guilt. This approach, however, was perceived as untenable by some members since by definition immunity assumed that the person may enjoy immunity for such acts. A point was made

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[291] *Ibid.*, para. 51.

[292] *Ibid.*, paras. 51 and 53.

[293] *Certain Questions of Mutual Assistance in Criminal Matters*, footnote 287 above, para. 196.

that the Commission would be in a position to contribute positively in regard to the definition of an "official act", noting that, if there was no agreement on the existence of immunity in relation to a specific crime, then the default position should be the lack of immunity.

123. According to another view, the rules of attribution for State responsibility seemed to be of limited value as such rules were intended to serve a purpose that was conceivably different from that of immunity. Since the distinction between *acta jure imperii* and *acta jure gestionis* was already well established in the law of State immunity, it was suggested, instead, that it could be inspirational in the development of a definition of official acts for purposes of immunity of State officials from criminal jurisdiction. Such a course of action might evince a tendency towards a more restrictive approach than the broad notion of attribution under State responsibility.

124. It was also pointed out that it was important to bear in mind that, although the international responsibility of the State and the international responsibility of individuals were linked, two different questions were implicated by the two notions and should be treated as such.

125. The Special Rapporteur was generally encouraged to undertake a further detailed analysis into all possibilities. It was suggested that, if the question whether an allegedly criminal conduct could be attributed to the State of the official as a matter of State responsibility could plausibly be answered in the negative, it necessarily followed that such conduct by an official could not be an "official act" for which a claim of immunity *ratione materiae* could be sustained. If, on the other hand, such conduct could affirmatively be attributed to the State it could well be: (a) that the conduct was *per se* an "official act" and therefore the official in all circumstances enjoyed immunity *ratione materiae*; (b) that the conduct still constituted an "official act", however, there were some exceptional circumstances where immunity *ratione materiae* could be denied, such as when the conduct alleged was a serious international crime; or (c) that the fact that the conduct could be attributed to a State did not by itself reveal whether or not it was an "official act" for purposes of immunity *ratione materiae*; which meant reliance, instead, on some other standard, perhaps one derived from other areas of international law on immunity.

(5) Possible exceptions to immunity

126. It was also recognized that the question of possible exceptions to immunity *ratione materiae* was a difficult issue which deserved utmost attention. Some members doubted that there existed in customary international law a human rights or international criminal law exception to immunity *ratione materiae*.

127. Some other members observed that there were certain peculiarities that the Commission had to grapple with in addressing the matter which revolved around the definition of the expression "official acts" or "acting in an official capacity". There was a choice either to consider international crimes as not "official acts" or to recognize that international crimes were actually committed in the context of implementation of State policy and should as such be characterized "official" acts for which immunity would be denied. In both cases, it would be necessary to analyze State practice and jurisprudence. In this regard, it was stressed that although the International Court of Justice, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, was seized with a matter concerning State immunity, the basic reasoning of the Court seemed relevant in the consideration of the present topic. The point was made, however, that the Court had emphasized, in that case, that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States and that the question whether and, if so, to what extent immunity might apply in criminal proceedings against an official of the State was not at issue in that case.

128. The judgment elicited different perspectives from members in terms of areas that needed further assessment.

129. Some members found it useful, when addressing the substance of the topic, that the Commission draw analogical value from the totality of the judgment, including the separate and dissenting opinions. Thus, distinct attention was drawn, and importance attached, to: (a) the need to accentuate the distinction between *acta jure imperii* and *acta jure gestionis*, which for immunity of State officials from criminal jurisdiction would imply a comparable restrictive development over the corresponding years beginning at the turn of the 20th century; (b) the need to acknowledge the difficulty of conceiving of the modern international law which, on the one hand, took an absolute view of sovereignty when it comes to responding to serious crimes of concern to the international community, while, on the other hand, is permissive of restrictions to sovereignty for commercial interests; (c) drawing from the survey of State practice in the "tort exception" to State immunity a corresponding restrictive development towards the immunity of foreign officials from criminal jurisdiction, particularly in the absence of firm State practice in one direction or the other.

130. It was pointed out by some other members that the case involving the alleged violation of *jus cogens* norms as a possible exception should be treated separately and in a differentiated fashion from the case concerning the commission of international crimes, here too giving a separate treatment to each crime, and defining precisely terms like "international crimes", "crimes under international law", "grave crimes under international law" or crimes that are breaches of *jus cogens* or *erga omnes* obligations. It was also noted that the basic methodology of the Court was useful for the topic in that it surveyed practice before national courts and found no sufficient support for the proposition that there was a limitation on State immunity based on the gravity of the violation, pointing to the need to assume the existence of immunity *ratione materiae*, unless there was widespread State practice showing a limitation based solely on the gravity of the alleged violation.

131. As regards *jus cogens*, it was recalled that in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the International Court of Justice had stated that there was no conflict between a rule of *jus cogens* and a rule of customary law which required one State to accord immunity to another. The two sets of rules addressed separate matters; the rules of State immunity, being procedural in character and confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State, had no bearing on the question of the substantive rules, which might possess *jus cogens* status, or on the question of whether or not the conduct in respect of which the proceedings were brought was lawful or unlawful.[294] Other members of the Commission, however, pointed out that some dissenting and separate opinions of the judges did in fact find that *jus cogens* affected the rules relating to immunities.

132. It was also suggested that even where State practice was not settled, it was possible, as a matter of progressive development, after weighing the potential for disruption of friendly relations among States with the desire to avoid impunity for heinous crimes, to consider the feasibility of (a) only allowing the State where the crime was committed or the State whose nationals were harmed by the crime to deny an assertion of immunity; (b) only allowing a State to deny a claim of immunity in cases where the offender was physically present in the territory of the State; and/or (c) only allowing a State to deny a claim of immunity when the prosecution has been authorized by the Minister of Justice or a comparable official of that State.

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[294] Judgment of 3 February 2012, paras. 92–95.

133. Recognizing that matters of substance were linked to procedural guarantees, the suggestion was also made that it might be useful for the Commission to look, in the context of the topic, at the exercise of prosecutorial discretion and the possibility of requiring the prosecutor, at an early stage in the proceeding, to make a *prima facie* showing that the official was not entitled to immunity. A consideration of such aspects would allow a court exercising criminal jurisdiction to screen out baseless accusations.

(d) Procedural aspects

134. It was considered by some members that substantive and procedural aspects of the topic were closely related and it may well be that the chances of reaching consensus on certain aspects may lie in addressing the procedural aspects beforehand. However, some members stated that the focus should be on the substantive aspects of immunity first, before proceeding to consider its procedural aspects. Another possibility was to deal with both substance and procedure when dealing with immunity *ratione personae* and immunity *ratione materiae*.

135. It was also suggested that the Commission might also address the question concerning prosecutorial discretion to ensure adequate safeguards to avoid potential abuse. Indeed, it was observed that if certain procedural elements — such as the degree of discretion granted to a prosecutor — were resolved early, it might be easier to make progress on the substantive issues.

(e) Final form

136. Some members viewed it essential that the Commission proceed on the basis that a binding instrument would eventually be elaborated. Some other members considered that it was premature to decide on the final form of the work of the Commission on the present topic. There was nevertheless general support for the Special Rapporteur's intention to prepare and submit draft articles on the topic, which would be completed on first reading during the present quinquennium. While recognizing that it was too early to indicate the number of draft articles to be presented, a suggestion was made that the focus should be on addressing the core issues rather than providing detailed rules on all aspects of the topic.

3. Concluding remarks of the Special Rapporteur

137. The Special Rapporteur expressed her appreciation for the useful and constructive comments made by members, stressing that the Commission worked as a collegial body, and the comments made enriched the discussion and would be taken fully into account in her future work. She restated her will to take into consideration the work undertaken by the former Special Rapporteur and by the Secretariat in its study, as well as the previous work of the Commission on related topics, while providing a new approach that would facilitate consensus in the Commission on the controversial aspects of the topic.

138. The Special Rapporteur also welcomed the general receptiveness, in the comments made, and the broad support given, to the methodology and approaches that she intended to pursue, including, in particular, the distinction between immunity *ratione personae* and *ratione materiae*, which was sought in the development of the topic, the proposed systematic approach and the treatment of the various blocks of questions in a successive fashion. In this connection, she stated that no methodological approach can be absolutely neutral in the work of the Commission. She confirmed that she planned to proceed on the basis of a thorough review of the State practice, doctrine and jurisprudence, both national and international. She also stated that taking into account values and principles was necessary, the need being to focus on those that were widely held and reflected international consensus. The overall objective would be to take a balanced approach in addressing immunity which would not contradict efforts undertaken by the international

community to combat impunity regarding the most serious international crimes. She also noted that the question of possible exceptions to immunity was going to be extremely important in the discussion of the Commission. It was noted that although notions like "absolute" or "relative" immunity had limitations analytically, they could however be useful in explaining and offering a clear distinction when the regime of possible exceptions was taken up by the Commission. In her view, only those crimes which are of concern to the international community as a whole, are egregious and are widely accepted as such on the basis of a broad consensus, including genocide, crimes against humanity and war crimes, could merit consideration in any discussion of possible exceptions. In that context as well, it would be crucial to examine State practice and the prior work of the Commission.

139. The Special Rapporteur concluded that, in the light of the debate, she was of the view that the workplan contained in paragraph 72 of her preliminary report continued to be entirely valid. She therefore expressed her intention to take up, in a systematic and structured manner, the consideration and analysis of the four blocks of questions identified in the proposed workplan, namely, general issues of a methodological and conceptual nature, immunity *ratione personae*, immunity *ratione materiae* and procedural aspects of immunity, in a concrete and practical way, by including in each of her substantive reports the corresponding draft articles. She indicated that, tentatively, her intention for next year was to address the general questions that are mentioned in section 1 of her workplan as well as the various aspects concerning immunity *ratione personae*. She also expressed the hope that it would be possible to conclude the first reading of the draft articles during the present quinquennium.

Chapter VII
Provisional application of treaties

A. Introduction

140. The Commission, at its sixty-third session (2011), decided to include the topic "Provisional application of treaties" in its long-term programme of work,[295] on the basis of the proposal which was reproduced in annex C to the report of the Commission on the work of that session.[296] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of, *inter alia*, the inclusion of this topic in the Commission's long-term programme of work.

B. Consideration of the topic at the present session

141. At its 3132nd meeting, on 22 May 2012, the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic.

142. At its 3151st meeting, on 27 July 2012, the Special Rapporteur presented to the Commission an oral report on the informal consultations held on this topic, under his chairmanship, on 19 and 25 July 2012 (see paragraphs 144–155 below). At the same meeting, the Commission took note of that report.

143. Also at the same meeting, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties.

Report of the Special Rapporteur of the informal consultations held on the topic

144. The purpose of these informal consultations had been to initiate an informal dialogue with members of the Commission on a number of issues that could be relevant for the consideration of this topic during the present quinquennium. The Special Rapporteur's intention was to submit his first substantive report at the Commission's sixty-fifth session (2013). However, he had shared with the members of the Commission an informal paper outlining some preliminary elements. Those elements were to be read together with the syllabus, prepared by Mr. Giorgio Gaja, containing the initial proposal for this topic, which was reproduced in annex C to the Commission's 2011 report (A/66/10). In the view of the Special Rapporteur, the very first basis for the Commission's consideration of this topic should be the work undertaken by the Commission on the topic concerning the law of treaties, as well as the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

145. At this initial stage, the Special Rapporteur had deemed it appropriate to seek the views of the members of the Commission on, *inter alia*, the following specific questions: (1) the procedural steps that would need to be considered as preconditions for provisional application and for its termination; (2) the extent to which article 18 of the 1969 Vienna

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[295] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 365–367.

[296] *Ibid.*, pp. 330–334.

Convention, which establishes the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the Vienna Convention; (3) to what extent the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and (4) the need for obtaining information on the practice of States.

146. A rich discussion had followed on these specific questions as well as on other aspects of the topic.

147. The first two questions had given rise to a number of comments and suggestions, which the Special Rapporteur intended to take into consideration in his reports. Concerning, in particular, the relationship between articles 18 and 25 of the 1969 Vienna Convention, the majority of the members who had taken the floor on this point were of the view that provisional application under article 25 went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. Although related in so far as they both had to do with the period preceding the entry into force of the treaty, these two provisions gave rise to different legal regimes and should be treated as such.

148. As to the question concerning the relevance of the situation created by the provisional application of treaties for the purpose of identifying rules of customary international law, the general feeling was that aspects relating to the formation and identification of customary international law should be excluded from the scope of this topic. An analysis of the customary status of article 25 of the Vienna Convention on the Law of Treaties could, however, be envisaged.

149. Concerning the practice of States and its possible use, it had been observed that, while the Commission should not be concerned by issues that remained a mere fact from the perspective of international law, the work on the topic could simply not ignore the internal position of States regarding provisional application. In this regard, it had been suggested that having a representative sample of relevant State practice would be useful for the work of the Commission.

150. It had also been suggested that it would be useful for the work of the Commission to have examples of provisional application clauses in treaties.

151. Other points addressed during the discussions included, for instance, the exact meaning of "provisional application" of a treaty; the various forms and manifestations covered by this legal institution; the legal basis for the provisional application of a treaty, namely article 25 itself or a parallel agreement to the treaty; the question of which organs were competent to decide on provisional application and the connection of this issue with article 46 of the 1969 Vienna Convention; whether the legal regime of provisional application was the same for different types of treaties; whether the provisional application of a treaty generated legally binding obligations, the breach of which would entail the international responsibility of the State(s) concerned; and, the modalities and effects of the termination of the provisional application of a treaty, which may raise questions related to the law governing the termination and suspension of the operation of treaties as contained in several articles of Section 3 of Part V of the 1969 Vienna Convention.

152. The question of the final outcome of the Commission's work on this topic had been also touched upon during the discussions. In this regard, the general feeling was that it was still premature for the Commission to take a decision on what should be that outcome. The possibility of elaborating draft articles had been mentioned by some members, but other possible forms, such as guidelines and model clauses, had also been alluded to and should not be excluded at this stage.

153. Some members had mentioned the possibility of requesting the Secretariat to prepare a memorandum on this topic. After consultations with the Secretariat, the Special Rapporteur believed that it would be very useful to have a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties. He therefore proposed that a mandate be given by the Commission to the Secretariat for the preparation of such a memorandum.

154. The Special Rapporteur expressed his sincere thanks to all the members of the Commission who had participated in these informal consultations and who had provided him with their invaluable comments and suggestions on numerous aspects of this topic. This exchange of views would greatly facilitate the task of the Special Rapporteur in preparing his first report.

155. The Special Rapporteur indicated that the Commission should not aim at changing the 1969 Vienna Convention. The purpose should rather be to extract whatever was useful for States to consider resorting to provisional application under certain circumstances and conditions. The flexibility that was inherent to this option needed to be preserved.

Chapter VIII
Formation and evidence of customary international law

A. Introduction

156. The Commission, at its sixty-third session (2011), decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work,[297] on the basis of the proposal reproduced in annex A to the report of the Commission on the work of that session.[298] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2012, took note of, *inter alia*, the inclusion of this topic in the Commission's long-term programme of work.

B. Consideration of the topic at the present session

157. At its 3132nd meeting, on 22 May 2012, the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Mr. Michael Wood as Special Rapporteur for the topic.

158. During the second part of the session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653). The Commission considered the Note at its 3148th, 3150th, 3151st and 3152nd meetings, on 24, 26, 27 and 30 July 2012.

159. At its 3153rd meeting, on 30 July 2012, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.

1. Introduction by the Special Rapporteur of his Note

160. The Special Rapporteur observed that uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally. Thus, the Commission's study of this topic might contribute to encouraging the acceptance of the rule of law in international affairs. The Special Rapporteur also hoped that it would provide practical guidance to judges and lawyers practising across a wide range of fields, including those who, while not necessarily specialists in international law, were nevertheless called upon to apply that law.

161. The Note needed to be read in conjunction with annex A to the Commission's 2011 annual report.[299] Its aim was to stimulate an initial debate. Section II listed seven "preliminary points" that might be covered by the Special Rapporteur in a report to be submitted at the sixty-fifth session (2013). The question of methodology was addressed in the Note. In this regard, the Special Rapporteur envisaged giving special emphasis to the approach followed by the International Court of Justice and its predecessor, the Permanent Court of International Justice, with respect to customary international law. In addition to considering the Court's pronouncements about methodology, it was necessary to examine what the Court had done, in practice, in particular cases. That having been said, the

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[297] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 365–367.

[298] *Ibid.*, annex A, pp. 305–314.

[299] *Ibid.*

approach of other international courts and tribunals, and of domestic courts, could be instructive as well.

162. The practice of States on the formation and identification of customary international law, while no doubt extensive, might not be easy to identify. An attempt should be made, however, to ascertain when it was that States saw themselves as legally bound by international custom, and to shed light on how their practice was to be interpreted.

163. The experience of those who had tried to identify customary international law in particular fields, such as the authors of the study commissioned by the International Committee of the Red Cross (ICRC) on "Customary International Humanitarian Law",[300] could make a significant contribution to the topic. The works of writers on the formation of customary international law — including textbooks, relevant monographs and specialized articles — might also shed important light. While different theoretical approaches might sometimes lead to similar results, this was not always the case.

164. Section III of the Note was devoted to the scope of the topic and possible outcomes – two related but distinct matters.

165. As for the scope, it did not seem to raise particularly difficult issues. The Special Rapporteur was open as to whether the Commission should deal with *jus cogens* under this topic, although his initial thinking was that *jus cogens* did not really belong in it.

166. On the possible form of the eventual outcome of the Commission's work, the Special Rapporteur suggested that it could be a set of 'conclusions' or 'guidelines', with commentaries; a convention would be scarcely appropriate in this field and would not be consistent with the need to preserve the degree of flexibility inherent in the customary process. At the same time, such conclusions should be relatively straightforward and clear in order to be of practical usefulness even for those who might not be experts in international law.

167. The Special Rapporteur was of the view that it would be appropriate to seek certain information from Governments. He also welcomed any information and thoughts that members of the Commission would provide to him in relation to the topic.

168. Finally, the Special Rapporteur sought the initial views of the members of the Commission on the tentative schedule for the development of the topic that appeared in section IV of the Note.

2. Summary of the debate

(a) General comments

169. The importance of the topic, as well as its practical and theoretical interest, were underlined by various members, taking into account the significant role that customary international law continued to play in the international legal system, as well as within the constitutional order and the domestic law of many States. Some members were of the view that the Commission's work on this topic was useful in order to provide guidance, not only to international lawyers, but also to domestic lawyers — including judges, government lawyers and practitioners — who were often called upon to apply rules of customary international law. At the same time, several members emphasized the inherent difficulty of this topic, the consideration of which posed real challenges to the Commission.

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[300] J.-M. Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, vol. I, 2009; vol. II, 2005.

170. According to a different view, it was doubtful that the Commission's work on this topic, in so far as it purported to follow a holistic approach to customary international law, could lead to any fruitful result; also, addressing at the same time the dynamic concept of "formation", which referred to a process, and the static concept of "evidence", which presupposed an existing body of rules, entailed some confusion.

171. It was the general view that the Commission should not be overly prescriptive, in order not to tamper with the flexibility of the customary process. It was also observed that, given the complexity and sensitivity of the topic, and also considering the "spontaneous" nature of the customary process, the Commission's approach to this topic should be a modest one; thus, at no point should the Commission embark on a codification exercise in a proper sense. The view was also expressed that the Commission's objective should be to help clarify the current rules on formation and evidence of customary international law, not to advance new rules.

172. Wide support was expressed for the tentative plan of work for the quinquennium as proposed in the Note, although some members were of the view that it was quite ambitious and needed to be approached with the necessary flexibility. Attention was drawn to the importance of ensuring that States had an opportunity to comment on the complete outcome of the work on this topic before its final adoption by the Commission.

(b) Scope of the topic and use of terms

173. Support was expressed for the Special Rapporteur's approach concerning the scope of the topic, as described in the Note. In particular, several members agreed that the work on this topic should cover the formation and evidence of customary law in the various fields of international law.

174. Some members suggested, however, that the main focus of the Commission's work should be the means for the identification of rules of customary international law, rather than the formation of those rules. A view was expressed that the Commission should not attempt to describe how customary law was formed, but should focus on the more operational question of its identification, i.e. how the evidence of a customary rule was to be established. However, some members underlined that the formation and identification of customary international law were closely linked. The observation was also made that some clarification of the process of formation of customary law was of both theoretical and practical importance because of the character of customary law as the result of a process.

175. While recognizing the need, in considering this topic, to address the distinction between customary international law and general principles of law, it was suggested that definitive pronouncements on the latter should be avoided, as general principles possessed their own complexities and uncertainties.

176. Several members expressed support for not including a general study *of jus cogens* within the scope of the topic. The point was made that the notion of *jus cogens* presented its own difficulties in terms of formation, evidence and classification. It was also observed that determining the existence of a customary rule was a different question than determining if such a rule also possessed the additional characteristic of not being subject to derogation by way of treaty. Some members suggested that, should the Commission decide not to include *jus cogens* within the scope of the topic, it should explain the reasons. According to another opinion, the Special Rapporteur should reconsider his intention not to deal with *jus cogens* norms, as those norms were essentially customary in character. A view was also expressed that it would be premature to exclude, at this stage, an analysis of *jus cogens*.

177. The need to clarify certain terms relating to the topic was underlined. Some members supported the proposal of the Special Rapporteur concerning the elaboration of a short lexicon or glossary of relevant terms in the six official languages of the United Nations. Specific mention was made of the need to explain such terms as "general international law" and "law of nations", and their relation to the notion of custom.

(c) Methodology

178. Several members expressed support for the Special Rapporteur's proposal to focus on the practical aspects of the topic rather than theory; it was stated, in particular, that the Commission should not attempt to evaluate the correctness of various theoretical approaches to customary international law. However, some members indicated that an analysis of the main theories would be useful to understand the nature of customary law and the process of its formation. The point was made that, in order to be seen as authoritative and as a useful tool for the international community as a whole in identifying rules of customary international law, the practical outcome that the Commission intended to seek had to be based on a thorough study which could not avoid dealing in an adequate manner with certain theoretical issues and controversies regarding the topic.

179. Attention was drawn to the question of the intended audience, namely for whom the Commission was undertaking this work. In this regard, it was suggested that the subjective perspective of States, the "inter-subjective" perspective of a third-party decision-maker, and the objective perspective of a detached observer be duly differentiated in order to avoid confusion.

180. Some members supported the view of the Special Rapporteur that particular emphasis should be given to analysing the case-law of international tribunals, and more specifically the International Court of Justice and its predecessor. Attention was drawn, however, to the need to consider also the case-law of other international courts and tribunals, including regional courts, some of which had made a significant contribution in identifying customary rules in specific fields of international law such as international criminal law or human rights law. Some members were of the opinion that the relevant case-law should be appraised critically, including by drawing attention to any methodological inconsistency that might be identified in judicial pronouncements. It was suggested that jurisprudential divergences with respect to the identification of a rule of customary international law be also studied.

181. According to another view, overreliance on the case-law of international courts and tribunals as a method of work for the purposes of this topic would be problematic in view of the "inter-subjective" context of judicial proceedings and of the limited number of areas covered by judicial precedents. The point was also made that, in many instances, international courts and tribunals did not indicate the reasoning on the basis of which the existence of a rule of customary law was asserted.

182. Some members referred to the need to research and analyse relevant State practice — including the jurisprudence of domestic tribunals — as well as practice of other subjects of international law such as international organizations. The importance for the Commission to base its work on contemporary practice was emphasized, as well as the need to take into account the practice of States from all of the principal legal systems of the world and from all regions.

183. It was suggested that, in addition to the work undertaken by the International law

Association[301] and by the ICRC,[302] and to the previous work of the Commission itself[303] that could be relevant to the topic, special attention be given to other work done in this field by individual researchers, academic institutions or learned societies. More generally, the importance of utilizing relevant sources from the various regions of the world, also representing the diversity of legal cultures, and in various languages was underlined.

(d) Points to be covered

184. Some members suggested that the work on this topic should focus on an analysis of the elements of State practice and *opinio juris*, including their characterization, their relevant weight and their possible expressions or manifestations in relation to the formation and identification of customary international law. It was suggested that consideration be given, in particular, to the extent to which these two elements were relied upon by courts and tribunals, including the International Court of Justice and its predecessor, as well as by States when making their arguments regarding the existence or non-existence of a rule of customary international law, whether before courts or within diplomatic forums.

185. Support was also expressed by some members for reviewing the origins of article 38, paragraph 1 (b) of the Statute of the International Court of Justice, by focusing on the *travaux* associated with the corresponding provision in the Statute of the Permanent Court of International Justice, and for studying the way in which that provision was understood by Courts and tribunals, and within the international community more generally.

186. It was proposed that the Commission consider the extent to which the process of formation of rules of customary international law had changed as a result of the profound modifications — including the significant increase in the number of States — that had occurred in the international legal system during the second half of the twentieth century; it was further suggested that those changes might have complicated, to a certain extent, the study of the formation and evidence of customary international law.

187. The question whether there were different approaches to customary law in various fields of international law was alluded to during the discussions. In this regard, the view was expressed that this question should not be answered *a priori* but on the basis of a thorough study of relevant practice.

188. The question of the degree of participation by States in the formation of rules of customary international law was mentioned by several members. Referring, in particular, to situations in which the conduct of a particular State or group of States might require special attention in the customary process, the point was made that the concept of "specially affected States" as well as the concept of "persistent objector" were important as they attempted to mediate between values of community and sovereignty in international law; thus, the Commission should avoid upsetting the equilibrium between these values that the current system seemed to provide. According to another view, these two concepts required thorough study by the Commission.

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[301] *London Statement of Principles Applicable to the Formation of General Customary International Law* (with commentary), Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association; *see International Law Association, Report of the Sixty-ninth Conference, London*, p. 39. For the plenary debate, see pp. 922–926. The *London Statement of Principles* is at pp. 712–777, and the report of the Working Session of the Committee on Formation of (General) Customary International Law held in 2000 is at pp. 778–790.

[302] See footnote 300 above.

[303] See, in particular, Report of the International Law Commission on the work of its second session (5 June–29 July 1950), paras. 24–94, *Yearbook … 1950*, vol. II, pp. 367–374 (Part II, Ways and Means for Making the Evidence of Customary International Law More Readily Available).

189. While indicating that the Commission should not become tied up in theoretical distinctions that ultimately had no practical value, it was observed that the age-old debate about "words" versus "actions" operated on a very practical level with respect to instances where certain rules of customary international law were asserted, not on the basis of the establishment of actual, operational practice of all or of a majority of States, but by relying on surrogates. Those instances occurred in two specific situations, namely when the assertion of a rule was based on the adoption by States of a resolution or on the existence of a widely ratified treaty. The hope was expressed that the outcome of the Commission's work on this topic could provide guidance and clarification with respect to those two arenas.

190. A number of other points were mentioned as deserving attention in the consideration of this topic. These included, *inter alia*, the relationship between custom and treaty, including the impact of widely ratified though not universal treaties, questions raised by article 38 of the 1969 Vienna Convention on the Law of Treaties, and possibly also the role of customary international law in the interpretation of treaties; the effect of codification treaties on the identification of customary rules; the relationship between custom and general international law, general principles of law and general principles of international law; the effect of resolutions of international organizations; more generally, the role of the practice of subjects of international law other than States, in particular international organizations such as the European Union; the relationship between "soft law" and custom, and between *lex lata* and *lex ferenda*; the importance, or not, to be accorded to inconsistent practice in the formation and identification of rules of customary international law; the relevance of the notion of opposability and the possible role of acquiescence, silence and abstentions in the process of formation of rules of customary international law; the role played, in that process, by unilateral acts such as protest and recognition; the respective conditions for the formation and for the modification of a rule of customary international law; the possible effects of reservations to treaties on rules of customary international law; the role of regional practice and its relation to international law as a system; as well as the relationship between regional and general customary international law.

(e) Final outcome of the Commission's work on the topic

191. Broad support was expressed for the Special Rapporteur's proposal concerning the elaboration of a set of conclusions with commentaries. The point was made that any such conclusions should not prejudice future developments concerning the formation of customary international law. It was also suggested that the Commission begin its work by drafting propositions with commentaries, which might become conclusions at a later stage.

3. Concluding remarks of the Special Rapporteur

192. The Special Rapporteur observed that, overall, the members of the Commission who had taken the floor welcomed the topic, and that the preliminary views expressed by them confirmed the main thrust of the Note. Attention had been drawn, *inter alia*, to the importance of customary international law within the constitutional order and the internal law of many States, and to the usefulness of the Commission's work for domestic lawyers. At the same time, it had been rightly noted that the reaction of the broader international community was important for the standing of the Commission's work on this topic.

193. A view had been expressed casting serious doubts about the topic, suggesting in particular that it was impractical, if not impossible, to consider the whole of customary international law even on a very abstract level, and that the contemplated outcome would either state the obvious or state the ambiguous. The Special Rapporteur indicated that it had never been the aim, under this topic, to "consider the whole of customary international law", or indeed any of it, in the sense of examining the substance of the law; the

Commission was only concerned with "secondary", or "systemic", rules on the identification of customary international law. He also recalled a point made during the discussions, namely that what might be obvious for some lawyers was not necessarily obvious for everyone, and not even for the vast range of lawyers, many of them not experienced in international law, who found themselves confronted by issues of customary international law. Moreover, the alleged ambiguity problem could be avoided by elaborating a clear and straightforward set of conclusions relating to the topic, accompanied, whenever necessary, by appropriate saving clauses – a technique that had often been resorted to by the Commission.

194. The Special Rapporteur was aware of the inherent difficulty of the topic and of the need to approach it with caution. He too hoped that the Commission would not be "over-ambitious", and he intended to work towards an outcome that was useful, practical, and hopefully well-received. There appeared to be a widespread view that such outcome was needed.

195. The Special Rapporteur did not entirely understand the proposed differentiation between subjective, "inter-subjective" and objective perspectives. If law was to have any meaning, the accepted method for identifying it must be the same for all. A shared, general understanding was precisely what the Commission might hope to achieve.

196. On the scope of the topic, there seemed to be general agreement with the approach suggested in the Note, subject to a proper understanding of what was meant by the terms "formation" and "evidence". Whatever the words used, the Special Rapporteur was of the view that the topic should cover both the method for identifying the existence of a rule of customary international law and the types of information that could be used for that purpose as well as the possible sources of such information.

197. As the topic progressed, the Commission could revert to the question of whether and to what extent *jus cogens* should be considered under this topic – a question on which divergent views had been expressed.

198. The Special Rapporteur noted that wide support had been expressed for developing a uniform terminology, with a lexicon or glossary of terms in the various UN languages.

199. He also observed that there seemed to be broad agreement that the ultimate outcome of the Commission's work on this topic should be practical. The aim was to provide guidance for anyone, and particularly those not expert in the field of public international law, faced with the task of determining whether or not a rule of customary international law existed. It seemed to be widely agreed that the final outcome of the Commission's work should be a set of propositions or conclusions, with commentaries. It would not be appropriate for the Commission to be unduly prescriptive, since, as various members had emphasised, it was a central characteristic of customary international law, one of its strengths, that it is formed through a flexible process. It also seemed to be widely accepted that it was not the Commission's task to seek to resolve theoretical disputes about the basis of customary law and the various theoretical approaches to be found in the literature to its formation and identification. At the same time, the Special Rapporteur accepted the point made by some members that the eventual practical outcome of the Commission's work on this topic, in order to be regarded as to some degree authoritative, must be grounded in detailed and thorough study, including of the theoretical underpinnings of the subject. The Special Rapporteur nevertheless believed that, at least initially, the main focus should be to ascertain what courts and tribunals, as well as States, actually did in practice. In this connection, he fully agreed with those members who had stressed the need to have regard to practice of States from all of the principal legal systems of the world and from all regions. He likewise shared the view of those members who had emphasized the

importance of drawing on writings from as wide a range of authors as possible, and in the various languages.

200. Concerning the tentative schedule for the consideration of the topic during the present quinquennium, the Special Rapporteur recognized that the projected reports for 2014 and 2015 might prove over-ambitious, though he did think that it was important to approach State practice and *opinio juris* at the same time, given their interconnection.

201. The Special Rapporteur expressed the hope that the Commission would be ready to mandate the Secretariat to prepare, if possible in time for the sixty-fifth session (2013), a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.

202. In conclusion, the Special Rapporteur had taken careful note of the various suggestions for what might be covered under the topic. These would be reflected in his future reports.

Chapter IX
The obligation to extradite or prosecute (*aut dedere aut judicare*)

A. Introduction

203. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[304]

204. The Special Rapporteur submitted four reports. The Commission received and considered the preliminary report at its fifty-eighth session (2006), the second report at its fifty-ninth session (2007), the third report at its sixtieth session (2008) and the fourth report at its sixty-third session (2011).[305]

205. At the sixty-first session (2009), an open-ended Working Group was established under the chairmanship of Mr. Alain Pellet,[306] and from its discussions, a proposed general framework for consideration of the topic, specifying the issues to be addressed by the Special Rapporteur, was prepared.[307] At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairman, was chaired by Mr. Enrique Candioti.[308]

B. Consideration of the topic at the present session

206. At the present session, the Commission decided to establish an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group was to evaluate progress of work on this topic in the Commission and to explore possible future options for the Commission to take. At this juncture, no Special Rapporteur was appointed in place of Mr. Galicki, who was no longer a member of the Commission.

207. At its 3152nd meeting, on 30 July 2012, the Commission took note of the oral report of the Chairman of the Working Group.

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[304] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission at its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty ninth Session, Supplement No. 10* (A/59/10), paras. 362–363).

[305] A/CN.4/571 (preliminary report); A/CN.4/585 and Corr.1 (second report); A/CN.4/603 (third report); and A/CN.4/648 (fourth report).

[306] During its sixtieth session, at its 2988th meeting on 31 July 2008, the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315).

[307] For the proposed general framework prepared by the Working Group, see *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[308] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairman of the Working Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 337–340).

Discussions of the Working Group

208. The Working Group held five meetings – four regularly scheduled meetings on 25 and 31 May and on 3 and 16 July; and, after the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, of 20 July 2012, a specially-convened meeting on 24 July 2012.

209. The Working Group exchanged views on, and made a general assessment of the topic as a whole against the background context of the debate on the topic in the Sixth Committee of the General Assembly. It proceeded on the basis of four informal working papers prepared by its Chairman dated 22 May, 30 May, 25 June and 12 July 2012, respectively.

(a) Major issues facing the topic

210. Some members considered it necessary to have a clearer picture of the issues arising under the topic. In this connection, several possibilities were suggested:

(a) *Harmonization*: Given the complex field of multilateral treaties containing the obligation to extradite or prosecute, it was suggested that the Commission might find it useful to harmonize the multilateral treaty regimes. However, it was noted that the obligation to extradite or prosecute operated differently across treaty regimes, as may be seen in the Secretariat's Survey of multilateral conventions which might be of relevance for the topic (A/CN.4/630). As such, any attempt at harmonization would be a less than meaningful exercise. If the goal was to elaborate draft articles, there did not seem much to be gained from elaborating draft articles where there were so many existing provisions in multilateral treaties.

(b) *Interpretation, application and implementation*: It was also suggested that it was possible for the Commission to make an assessment the actual interpretation, application and implementation of the extradite-or-prosecute clauses in particular situations, such as the one before the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case. However, it was argued, such situations typically concerned application of the law to specific facts, which was not something the Commission could usefully study. Moreover, there did not appear to be any serious systemic problem in the existing treaty regimes which required clarification by the Commission; at least, none was identified in the syllabus on the topic[309] and in the previous reports of the Special Rapporteur.

(c) *Progressive development of international law and its codification*: It was suggested that, in considering this topic, the Commission might pursue a systematic survey and analysis of State practice to see if there existed a customary rule reflecting a general obligation to extradite or prosecute for certain crimes, or whether such an obligation was a general principle of law. If no such norm existed, the Commission could say as much. If such a norm did exist, then draft articles would indicate the nature and scope of that norm, as well as the crimes to which it applied. It was also suggested that the focus could be on core crimes under international law (genocide, war crimes and crimes against humanity, etc.) and on their relationship with the obligation to extradite or prosecute, so as to fill any lacuna in the law on individual criminal responsibility. However, the utility of such an endeavour was doubted by some other members. In respect of core crimes in international law, such as genocide, crimes against humanity, and grave breaches of international humanitarian law, it was argued that such an exercise would be futile since the Commission had already completed, in 1996, the Draft Code of Crimes against the peace and security of mankind.[310] Article 9 of the Draft Code already contains an obligation to extradite or prosecute for the core crimes. According to this view, if the Commission were to look beyond the core crimes and postulate a general obligation to cover a wider range of crimes, such an approach would compel the Commission to delve into the general consideration of extradition law, as well as broad matters concerning the exercise of prosecutorial discretion, and practice in these areas varied considerably, thereby raising doubts about the existence of such a general obligation.

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[309] *Official records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), annex.

211. It was suggested by some members that the main stumbling block in the way of the progress on the topic had been the absence of basic research on whether or not the obligation had attained customary law status. This was a preliminary matter to be addressed and resolved and had implications for any approach to be taken. It was also observed that when the Commission was elaborating the Draft Code of Crimes against the peace and security of mankind in 1996, its adoption of draft articles 8 and 9 appeared to have been driven by the need for an effective system of criminalization and prosecution rather than an assessment of actual State practice and *opinio juris*. It was an open question then whether draft articles 8 and 9 would be applied only to States Parties to the Draft Code or to all States.[311] It was also recalled that when the Commission was dealing with the Draft Code it was understood that the inclusion of certain crimes in the Draft Code did not affect the status of other crimes under international law; neither did it in any way preclude further developments of this important area of law.[312] In this connection, it was seen as important by some members to analyze the evolution of the law since 1996. Some members viewed the distinction between core crimes and other crimes under international law as significant. Also singled out was the importance of addressing, in the context of the topic, the duty to cooperate in combating impunity, so as to determine exactly how the scope of the duty, particularly in light of its formulation in various instruments, bears on the obligation.

212. There was consensus that, in general, the topic before the Commission concerned the obligation to extradite or prosecute and not *either* (i) the extradition practices of States or an obligation to extradite, *or* (ii) the obligation to prosecute, *per se*.

213. Lastly, there was also general consensus that exploring the possibility of the obligation to extradite or prosecute as a general principle of international law would not advance the work on the topic any further than the avenue of customary international law.

(b) Relationship with universal jurisdiction

214. On the relationship between the topic and universal jurisdiction, some members emphasized that an analysis of universal jurisdiction would inevitably have to be undertaken in the consideration of the topic, in view of the close relationship between the two, although the Commission would not address universal jurisdiction as the central theme of the topic. It was pointed out by certain members that universal jurisdiction was itself a subject requiring codification, and that, for a meaningful product to emerge from the Commission, the consideration of universal jurisdiction would have to be an important component part of the exercise or even the central question to be considered. Some members drew attention to the on-going work on the scope and application of the principle of universal jurisdiction being undertaken in the context of the Sixth Committee of the General Assembly of the United Nations. It was considered appropriate for the Commission to delink the topic from universal jurisdiction insofar as the obligation to extradite or prosecute did not depend on universal jurisdiction. It was also noted that the Commission

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[310] *Yearbook … 1996*, vol. II (Part Two).

[311] *Yearbook … 1994*, vol. II (Part Two), para. 142.

[312] *Yearbook … 1996*, vol. II (Part Two), para. 46.

could proceed with an analysis of the role of universal jurisdiction *vis-à-vis* the obligation to extradite or prosecute without awaiting the finalization of the work of the Sixth Committee on universal jurisdiction.

(c) Feasibility of the topic

215. Some members acknowledged the importance attached by States to the topic, it being perceived as useful not only from a practical standpoint in that it would help resolve problems encountered by States in implementing the obligation to extradite or prosecute, but also because the obligation played a key coordinating role between the national and international systems in the overall architecture of international criminal justice.

216. In this connection, it was noted by some members that any absence of a determination on the customary law nature of the obligation would not pose insurmountable difficulties in the further consideration of the topic. It was suggested that the focus, taking both progressive development of international law and its codification into account, could be on the obligation to extradite or prosecute as evidenced especially in multilateral treaties, including the material scope and the content of the obligation, the relationship between the obligation and other principles, conditions for the triggering of the obligation, the implementation of the obligation, as well as the relationship between the obligation and the surrender of the alleged offender to a competent international criminal tribunal. It was also suggested that the work to be carried out focus on practical implementation of the obligation.

217. Some other members stressed the importance of proceeding with caution. Attention was drawn to the general background of the work already done on the topic since its inclusion in the programme of work of the Commission, pointing to its complexity as a justification for not taking any hasty decisions at this stage on the appointment of a new Special Rapporteur and on whether and how to proceed with the topic. The relevance of treaties and customary international law in the consideration of the topic was highlighted. Insofar as treaties were concerned, the typology of treaties in the Secretariat's Survey of multilateral conventions which may be of relevance for the topic (A/CN.4/630) was viewed as useful. However, it was considered prudent to study carefully the decision of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, before taking any definitive positions. Some members recalled that a determination of the customary nature of the obligation was only part of the issue, as the relationship between the obligation to extradite or prosecute and other principles, such as *nullum crimen sine lege* and *nulla poena sine lege*, should also be addressed, as suggested in the proposed general framework for the Commission's consideration of the topic, prepared by the Working Group in 2009.

218. It was also pointed out that the proposed general framework, together with the Secretariat's Survey, remained useful to the work by the Commission on the topic.

219. Lastly, it was suggested by some members that the Commission terminate its work on the topic since, in their opinion, this was an area of law to which the Commission could not presently make substantial contributions.

(d) Judgment of the ICJ in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case

220. The International Court of Justice rendered its judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case in the afternoon of Friday 20 July 2012, when the Working Group was supposed to have already concluded its substantive work during this session and report to the Plenary. The Working Group conducted a preliminary review of the judgment on 24 July 2012, at a meeting specially

convened for that purpose. It was recognised that an in-depth analysis would be required to assess fully its implications for the topic.

(e) Way forward

16. The Working Group requested its Chairman to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various perspectives in relation to the topic in light of the judgment of the International Court of Justice of 20 July 2012, any further developments, as well as comments made in the Working Group and the debate of the Sixth Committee. The Working Group, on the basis of its discussions at the sixty-fifth session, will submit concrete suggestions for the consideration of the Commission.

Chapter X
Treaties over time

A. Introduction

222. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[313] At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[314]

223. At the sixty-second session (2010), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.[315]

224. At the sixty-third session (2011), the Study Group, under the same chairmanship, first took up the remainder of the work on the introductory report prepared by its Chairman. The Study Group then began its consideration of the second report by the Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, focusing on some of the general conclusions proposed therein. Due to lack of time, the Study Group could only discuss twelve of those conclusions.[316] In the light of the discussions, the Chairman reformulated the text of what had become his first nine preliminary conclusions.[317]

B. Consideration of the topic at the present session

225. At the present session, the Study Group on Treaties over time was reconstituted again under the chairmanship of Mr. Georg Nolte. The Study Group held eight meetings, on 9, 10, 15, 16 and 24 May, and on 19, 25 and 26 July 2012.

226. At the 3135th meeting of the Commission, on 29 May 2012, the Chairman of the Study Group presented a first oral report to the Commission on those aspects of the work undertaken by the Study Group at its five meetings from 9 to 24 May which were related to the format and the modalities of the Commission's future work on this topic. In his report, the Chairman indicated, *inter alia*, that the Study Group recommended that the Commission change the format of the work on this topic and appoint a Special Rapporteur.

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[313] At its 2997th meeting, on 8 August 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353). For the syllabus of the topic, see *ibid.*, annex A. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[314] See *Official Records of the General Assembly, Sixty- fourth Session, Supplement No. 10* (A/64/10), paras. 220–226.

[315] *Ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354.

[316] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 336–341.

[317] For the text of these preliminary conclusions by the Chairman of the Study Group, see *ibid.*, para. 344.

227. At its 3136th meeting, on 31 May 2012, the Commission decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

228. On 30 July 2012, the Chairman of the Study Group presented to the Commission a second oral report on the work done by the Study Group. The Commission took note of that oral report at its 3151st meeting on 30 July 2012.

1. Discussions of the Study Group

229. At the present session, the Study Group (a) completed its consideration of the second report by its Chairman, which it had begun at the sixty-third session (2011); (b) considered the third report by its Chairman; and (c) engaged in a discussion of the format and the modalities of the work of the Commission on this topic.

(a) Completion of the consideration of the second report by the Chairman of the Study Group

230. The Study Group completed its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice. In so doing, the Study Group examined six additional general conclusions proposed in the second report. The discussions focused on the following aspects: the question whether a subsequent practice, in order to serve as a means of interpretation, must reflect a position regarding the interpretation of the treaty; the extent to which subsequent practice would need to be specific; the necessary degree of active participation in a practice and the significance of silence by one or more parties to the treaty with respect to the practice of one or more other parties; the possible effects of contradictory subsequent practice; the question of possible treaty modification through subsequent practice; and the relationship between subsequent practice and formal amendment or interpretation procedures.

231. In the light of these discussions in the Study Group, the Chairman reformulated the text of what had now become six additional preliminary conclusions by the Chairman of the Study Group (see section 2. below). As it had done for the first nine preliminary conclusions reproduced in the Commission's 2011 report,[318] the Study Group agreed that these six preliminary conclusions by its Chairman would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur, including on additional aspects of the topic, and of the future discussions within the Commission.

(b) Consideration of the third report by the Chairman of the Study Group

232. The Study Group considered the third report by its Chairman on "Subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings". That report covers a variety of issues. These include the forms, evidence and interpretation of subsequent agreements and subsequent practice, as well as a number of general aspects concerning, *inter alia*, the possible effects of subsequent agreements and subsequent practice (e.g. in terms of specifying the meaning of a treaty provision or confirming the degree of discretion left to the parties by a treaty provision); the extent to which an agreement in the sense of article 31, paragraph 3 (a) and (b) of the 1969 Vienna Convention on the Law of Treaties must express the legal opinion of States parties

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[318] See *supra*, note 17.

regarding the interpretation or application of the treaty; subsequent practice as possibly indicating agreement on a temporary non-application or on a temporary extension of the scope of the treaty, or as expressing a *modus vivendi*; bilateral and regional practice under treaties with a broader membership; the relationship between subsequent practice and agreements, on the one hand, and technical and scientific developments, on the other hand; the relationship between subsequent practice by the parties under a treaty and the parallel formation of rules of customary international law; the possible role of subsequent agreements and subsequent practice in respect of treaty modification; as well as the role that may be exceptionally played by subsequent practice and subsequent agreements in terminating a treaty. Furthermore, the third report addresses other aspects such as the influence of specific cooperative contexts on the interpretation of some treaties by way of subsequent practice, and the potential role played by conferences of the States parties and treaty monitoring bodies in relation to the emergence or consolidation of subsequent agreements or practice. In analyzing these various issues, the third report provides examples of subsequent agreements and subsequent practice, assesses those examples and attempts to draw some preliminary conclusions.

233. The debate in the Study Group on the third report was very rich. Many members commended the Chairman for the thorough character of his report and for the extensive research undertaken for its preparation. One general issue that was touched upon by several members during the discussions was the level of determinacy of the draft conclusions contained in the third report. While some members were of the view that many of them were formulated in rather general terms, other members considered that certain conclusions were too determinate in the light of the examples identified in the report. In this regard, it was observed by some members that the main challenge in the Commission's future work on this topic was to attempt to elaborate propositions with a sufficient normative content, while preserving the flexibility inherent in the concept of subsequent practice and agreements. In relation to the section of the report dealing with conferences of the parties, a number of points were raised, including the question to what extent such *fora* deserved a special treatment in the consideration of the present topic; whether there was a single notion of "conference of the parties" or whether this term covered a variety of different bodies whose common character would be the fact that they are not organs of international organizations; the extent to which the conferral or not, on conferences of the parties, of decision-making power or reviews powers had an impact on their possible contribution to the formation of subsequent agreements or subsequent practice in relation to a treaty; and the significance and relevance, in the present context, of consensus and other decision-making procedures that might be followed by conferences of the parties.

234. In view of the decision of the Commission to change the future format of the work, the Chairman did not propose to the Study Group, in contrast to what he had done with respect to the second report, that he reformulate the draft conclusions which were contained in his third report in the light of the discussions of the Study Group. He indicated that he preferred to take these discussions into account when preparing his first report as Special Rapporteur. This first report would synthesize the three reports which he had submitted to the Study Group.

(c) Modalities of the Commission's work on the topic

235. The Study Group discussed the format in which the further work on the topic should proceed and the possible outcome of this work. Several members expressed the view that, in view of the preparatory work which had been accomplished and considering the need to focus the work on the envisaged outcome, the time had come for the Commission to change the format of the work on the topic and to appoint a Special Rapporteur. It was felt that this would be the most efficient way of making use of the work already done.

236. The Chairman indicated that he would welcome a change in the format of the work on the topic at this stage. This would enable the Commission to focus on the ultimate outcome of the work. In his view, it had been necessary to first identify, collect, arrange and discuss the most important sources of the topic. This had been done by the first three reports for the Study Group and by the discussions within the Study Group. The three available reports could now be synthesized into one report which could be made available for all States and be debated in the plenary.

237. The Chairman also expressed the view that a change of the format of the work would give the Commission the opportunity to define more sharply the scope of the topic. He reminded the members that an important reason for the Commission to pursue the work on the topic "Treaties over time" within the format of a Study Group had been to give the members the opportunity to consider whether this topic should be approached with a broad focus — which would have also involved, *inter alia*, an in-depth treatment of the termination and the formal amendment of treaties — or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. Since the discussions within the Study Group had led to the result that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice, an important reason why the Commission had originally chosen to deal with the topic in the framework of a Study Group was no longer pertinent. He welcomed this development, having previously expressed his preference for a narrower approach to the topic.

238. The Chairman suggested that, if the format of the work on the topic were to be changed in the contemplated way, a report which would synthesize the three reports which have been submitted to the Study Group so far should be prepared for the sixty-fifth session. This report should take into account the discussions which had been held so far within the Study Group and should contain specific conclusions or guidelines which would be derived in particular from materials contained in the existing three reports for the Study Group. After the debates on this report within the Commission during the next session and the discussions in the Sixth Committee in 2013, one or two further reports should be submitted, as it has been envisaged in the original proposal of the topic, on the practice of international organizations and the jurisprudence of national courts (annex A to the report of the Commission on the work of its sixtieth session (2008)[319]). These reports would contain additional conclusions or guidelines which would complement or modify, as appropriate, the work based on the first report. These conclusions or guidelines would be explained by commentaries. The work on the topic could then be finalized within the current quinquennium. It would be understood that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for interpretation (article 31 of the Vienna Convention on the Law of Treaties), as explained in the original proposal for the topic.[320]

239. The members of the Study Group agreed with the suggestions of the Chairman on how to proceed further with the work on the topic. On this basis, the Study Group recommended that the Commission decide to change the format of the work on the topic and appoint a Special Rapporteur. As indicated above (para. 227), the Commission, at its 3136th meeting, on 31 May 2012, decided to follow this recommendation of the Study Group.

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[319] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), annex A, paras. 17, 18, 39 and 42.

[320] *Ibid.*, paras. 11 *et seq.*

2. Preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group[321]

240. The six additional preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group, are as follows:

(1) Subsequent practice as reflecting a position regarding the interpretation of a treaty

In order to serve as a means of interpretation, subsequent practice must reflect a position of one or more parties regarding the interpretation of a treaty.[322] The adjudicatory bodies reviewed, however, do not necessarily require that subsequent practice must expressly reflect a position regarding the interpretation of a treaty, but may view such a position to be implicit in the practice.[323]

(2) Specificity of subsequent practice

Depending on the regime and the rule in question, the specificity of subsequent practice is a factor which can influence the extent to which it is taken into account by adjudicatory bodies.[324] Subsequent practice thus need not always be specific.

(3) The degree of active participation in a practice and silence

Depending on the regime and the rule in question, the number of parties which must actively contribute to relevant subsequent practice may vary.[325] Most adjudicatory bodies that rely on subsequent practice have recognized that silence on the part of one or more parties can, under certain circumstances, contribute to relevant subsequent practice.[326]

(4) Effects of contradictory subsequent practice

Contradictory subsequent practice can have different effects depending on the multilateral treaty regime in question. Whereas the WTO Appellate Body discounts practice which is contradicted by the practice of any other party to the treaty,[327] the

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[321] These preliminary conclusions supplement those reproduced in the report of the Commission on the work of its sixty-third session (2011); see *supra*, note 317.

[322] See e.g. ECtHR, *Cruz Varas et al. v. Sweden*, 20 March 1991, para. 100, Series A No. 201.

[323] ECtHR, *Marckx v. Belgium*, 13 June 1979, para. 41, Series A No. 31; *Kart v. Turkey* [GC], para. 54, No. 8917/05, 13 December 2009; see also Iran-US Claims Tribunal, The Islamic Republic of Iran and the United States of America, Partial Award No. 382-B1-FT (31 August 1988), reprinted in 19 Iran-US C.T.R. 273, pp. 294–295.

[324] See WTO, US – Upland Cotton, Report of the Appellate Body, 3 March 2005, WT/DS267/AB/R; Iran-US Claims Tribunal, Case No. A17, Decision No DEC 37-A17-FT (18 June 1985), reprinted in 8 Iran-US C.T.R 189, p. 201; ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, para. 285, 7 January 2010, selected for publication in Reports of Judgments and Decisions; *Chapman v. the United Kingdom* [GC], No. 27238/95, paras. 93 and 94, ECHR 2001-I; ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 17 (1 February 2011), para. 136; Furundzija, ICTY (TC), Judgment of 10 December 1998, para. 179.

[325] EC – Chicken Cuts, Report of the Appellate Body, 12 September 2005, WT/DS269/AB/R, para. 259.

[326] Furundzija, ICTY (TC), Judgment of 10 December 1998, para. 179; ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, para. 285, 7 January 2010, selected for publication in Reports of Judgments and Decisions; cautiously: EC – Chicken Cuts, Report of the Appellate Body, 12 September 2005, WT/DS269/AB/R, para. 272; see also, for a limited holding, RayGo Wagner Equipment Company and Iran Express Terminal Corporation, Award No. 30-16-3 (18 March 1983), reprinted in 2 Iran-U.S. C.T.R 141, p. 144.

[327] EC – Computer Equipment, Report of the Appellate Body, 5 June 1998, WT/DS62/AB/R *et al.*, paras.

European Court of Human Rights, faced with non-uniform practice, has sometimes regarded the practice of a "vast majority" or a "near consensus" of the parties to the European Convention to be determinative.[328]

(5) Subsequent agreement or practice and formal amendment or interpretation procedures

There have been instances in which adjudicatory bodies have recognized that the existence of formal amendment or interpretation procedures in a treaty regime do not preclude the use of subsequent agreement and subsequent practice as a means of interpretation.[329]

(6) Subsequent practice and possible modification of a treaty

In the context of using subsequent practice to interpret a treaty, the WTO Appellate Body has excluded the possibility that the application of a subsequent agreement could have the effect of modifying existing treaty obligations.[330] The European Court of Human Rights and the Iran-US Claims Tribunal seem to have recognized the possibility that subsequent practice or agreement can lead to modification of the respective treaties.[331]

92–93; US – Continued Zeroing, Report of the Panel, 1 October 2008, WT/DS350/R, para. 7.218.

[328] See e.g. *Demir and Baykara v. Turkey* [GC], No. 34503/97, 12 November 2008, para. 52 (selected for publication in Reports of Judgments and Decisions); *Sigudur A. Sigurjónsson v. Iceland*, 30 June 1993, para. 35, Series A No. 264.

[329] EC – Chicken Cuts, Report of the Appellate Body, 12 September 2005, WT/DS269/AB/R, WT/DS286/AB/R, para. 273; see also ECtHR, *Öcalan v. Turkey* [GC], No. 46221/99, para. 163, ECHR 2005-IV.

[330] EC – Bananas III, Second Recourse to Article 21.5, Appellate Body Report, 26 November 2008, WT/DS27/AB/RW2/ECU, paras. 391–393, in this connection see also Article 3.2. DSU. See also ECJ, Case C-327/91, *France v. Commission*, [1994] ECR I-3641.

[331] ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, 2 March 2010, paras. 119 and 120; ECtHR, *Öcalan v. Turkey* [GC], No. 46221/99, para. 163, ECHR 2005-IV; Iran-U.S. Claims Tribunal, *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), 9 September 2004, 2004 WL 2210709 (Iran-U.S.Cl.Trib.), p. 24 (para. 132).

Chapter XI
The Most-Favoured-Nation clause

A. Introduction

241. The Commission, at its sixtieth session (2008), decided to include the topic "The Most-Favoured-Nation clause" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[332]

242. A Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[333] and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.[334]

B. Consideration of the topic at the present session

243. At the present session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae. At the first meeting of the Study Group, tribute was paid to the former Co-chair of the Study Group, Mr. A. Rohan Perera.

244. At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairman of the Study Group.

1. Work of the Study Group

245. The Study Group held 6 meetings on 24 and 31 May and on 11, 12, 17 and 18 July 2012.

246. The overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment particularly in relation to MFN provisions. It is considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. It seeks to elaborate an outcome that would be of practical utility to those involved in the investment field and to policymakers. It is not the intention of the Study Group to prepare any draft articles or to revise the 1978 draft articles of the Commission on the Most-Favoured-Nation clause. It is envisaged that a report will be prepared, providing the general background,

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[332] At its 2997th meeting, on 8 August 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 354). For the syllabus of the topic, see *ibid.*, annex B. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[333] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 211–216). The Study Group considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.

[334] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 359–373). The Study Group considered and reviewed the various papers prepared on the basis of the 2009 framework to serve as a road map of future work, and agreed upon a programme of work for 2010.

analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including possible guidelines and model clauses.

247. To date, the Study Group, in order to illuminate further the contemporary challenges posed by the MFN clause, has considered several background papers. In this connection, it has examined (a) a typology of existing MFN provisions, which is an on-going study; (b) the 1978 Draft articles adopted by the Commission and areas of their continuing relevance; (c) aspects concerning how the MFN clause had developed and was developing in the context of the GATT and the WTO; (d) other developments in the context of the OECD and UNCTAD; (e) an analysis of contemporary issues concerning the scope of application of the MFN clause, such as those arising in the *Maffezini* award.[335]

248. Additional work had also been undertaken to identify the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision interpreted. Moreover, to identify further the normative content of the MFN clauses in the field of investment, there had been an analysis of factors taken into account by tribunals in the interpretation and application of MFN clauses in investment agreements, building upon earlier work done on the MFN clause and the *Maffezini* award.[336]

249. The Study Group has previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, the relationship between MFN, fair and equitable treatment, and national treatment standards, as well as other areas of international law to assess whether any application of MFN in such areas might provide some insight for the work of the Study Group.

2. Discussions of the Study Group at the present session

250. At the present session of the Commission, the Study Group had before it a working paper on the "Interpretation of MFN Clauses by Investment Tribunals", prepared by Mr. McRae. It also had before it a working paper on the "Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions", prepared by Mr. Mathias Forteau.

251. The working paper by Mr. McRae was a restructured version of the 2011 working paper, "Interpretation and Application of MFN Clauses in Investment Agreements", taking into account recent developments and discussions of the Study Group in 2011. It contained an analysis of recent decisions and further factors, which had been taken into account in the case law. It also provided an assessment of the different interpretative approaches utilized by tribunals.

252. In course of the discussion of the working paper by Mr. McRae, there was an exchange of views on whether the nature of the tribunal had a bearing on how it goes about treaty interpretation, in particular whether the mixed nature of arbitration (including both a State and a private party) constituted a relevant factor in the interpretative process. The working paper by Mr. Forteau was prepared as a consequence of that discussion.

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[335] *Catalogue of MFN provisions* (Mr. D.M. McRae and Mr. A.R. Perera); *The 1978 draft articles of the International Law Commission* (Mr. S. Murase); *MFN in the GATT and the WTO* (Mr. D.M. McRae); *The Work of OECD on MFN* (Mr. M. Hmoud); *The Work of UNCTAD on MFN* (Mr. S.C. Vasciannie); *The* Maffezini *problem under investment treaties* (Mr. A.R. Perera).

[336] *Interpretation and Application of MFN Clauses in Investment Agreements* (D.M. McRae). See also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 351–353.

253. The two working papers constitute preparatory documents to form part of the overall report to be submitted by the Study Group.

254. The Study Group also had before it an informal working paper on Model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* decision, including by specifically stating that the MFN clause does not apply to dispute resolution provisions; or specifically stating that the MFN clause does apply to dispute resolution provisions; or specifically enumerating the fields to which the MFN clause applies. It also had before it an informal working paper providing an overview of MFN-type language in Headquarters Agreements conferring on representatives of States to the organization the same privileges and immunities granted to diplomats in the host State. These informal working papers, together with an informal working paper on "Bilateral Taxation Treaties and the Most-Favoured-Nation Clause" which was not discussed by the Study Group, are still a work in progress and will continue to be updated to ensure completeness.

(a) Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau)

255. The working paper offered an explanation of the mixed nature of arbitration in relation to investment; an assessment of the peculiarities of the application of the MFN clause in mixed arbitration; and studied the impact of such arbitration on the application of the MFN clause to procedural provisions. It was considered that the mixed nature of investment arbitration operated on two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature. Moreover, it was argued that the tribunal in such instance was a functional substitute for an otherwise competent domestic court of the host State.[337] Mixed arbitration was thus situated between the domestic plane and international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration.[338] It had a private and a public element to it.

256. Assessing the peculiarities of the application of the MFN clause in mixed arbitration, it was pointed out that while *ratione materiae* the 1978 draft articles covers all type of areas including the establishment of foreign physical and juridical persons, their personal rights and obligations, *ratione personae* their general scope did not include obligations or rights to be performed or enjoyed by individuals. In the classical sense, an individual was not considered, as an international subject, in the application of the MFN clause. The effect of a mixed tribunal was that an individual, like the State, was also a beneficiary of the MFN clause in the international order; the individual, without being a party to a treaty, can invoke jurisdictional clauses of a treaty against a respondent State party; since the treaty offers both the treatment and is the basis of the right of recourse to arbitration, it becomes difficult to distinguish what falls under the settlement of disputes related to the treaty from what falls under the treatment offered by the treaty. The effect of the latter aspect is that there are two interpretative trends: one insists on the "treatment" aspect (two States grant to their respective nationals a preferential treatment) in order to justify more easily the application of the MFN clause to the dispute settlement clause; the other insists on the "dispute

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[337] Stephan W. Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis for Jurisdiction – A Reply to Zachary Douglas", *Journal of International Dispute Settlement*, vol. 2, No. 2 (2011), p. 362, note 31. See also M. Forteau, « Le juge CIRDI envisagé du point de vue de son office : juge interne, juge international, ou l'un et l'autre *à la fois* », *Mélanges Jean-Pierre Cot*, Bruylant, Bruxelles, 2009, pp. 95–129.

[338] See on this point Franck Latty, « Arbitrage transnational et droit international général », *Annuaire français de droit international*, 2008, pp. 471–475.

settlement" aspect (the dispute settlement clause is the basis of the consent of the State to arbitration) by emphasizing the need to respect the principle of State consent to arbitration.

257. In terms of impact, it was suggested that it was not excluded that at least special interpretive guidelines, if not rules of interpretation, apply to mixed arbitration because of its unique nature. The impact was that, depending of the aspect of the mixed nature, some tribunals give more importance to the public aspect of arbitration (or to the "settlement of dispute" aspect) (public approach) than to its private aspect (or to the "treatment' aspect"), others will make the opposite choice (private approach); while in yet other cases, there is a mix of the two aspects (syncretic approach).

(b) Working paper on the "Interpretation of MFN Clauses by Investment Tribunals" (Mr. D.M. McRae)

258. It was recognized in the working paper that, notwithstanding a reliance on treaty interpretation or the invocation of the interpretative tools under the Vienna Convention on the Law Treaties in the interpretation of MFN clauses, there was little consistency in the way in which investment tribunals actually went about the interpretative process, or necessarily in the conclusions that they reached. Accordingly, it reviewed further the approaches taken by investment tribunals seeking to identify certain factors which appeared to influence investment tribunals in interpreting MFN clauses and to identify certain trends.

259. These factors and trends included the following: (a) drawing a distinction between *substance and procedure*, by inquiring into the basic question whether in principle an MFN provision could relate to both the procedural, as well as the substantive provisions of the treaty; (b) interpreting the MFN provision in relation to the dispute settlement provisions of the treaty as a *jurisdictional matter*, where there was an implication in some cases of an alleged higher standard for interpreting whether the scope of an MFN clause was one of agreement to arbitrate, while in some other cases a differentiation is made between *jurisdiction and admissibility*, in which case, a provision affecting a right to bring a claim, which is a jurisdictional matter, was distinguished from, a provision affecting the way in which a claim has to be brought, which has been construed as going to admissibility; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty had already been covered, in a different way, in the basic treaty itself; (d) considering the treaty-making *practice* of either party to the BIT, in respect of which an MFN claim had been made, as a means of ascertaining the intention of the parties regarding the scope of the MFN clause; (e) considering the *relevant time* at which the treaty was concluded (principle of contemporaneity), as well as to subsequent practice to ascertain the intention of the parties; (f) assessing the influence on the tribunal of the content of the provision sought to be ousted or added by means of an MFN clause; (g) acknowledging an implicit *doctrine of precedent*, a tendency influenced by a desire for consistency rather than any hierarchical structure; (h) assessing the content of the provision invoked to determine whether, in fact, it accorded *more/less favourable treatment*; and (i) considering the existence of *policy exceptions*.

(c) Summary of the discussions

260. While recognizing that the focus of the work of the Study Group was in the area of investment, the Study Group viewed it as appropriate that the issues under discussion should be located within a broader normative framework, against the background of general international law and prior work of the Commission. The Study Group also confirmed the possibility of developing guidelines and model clauses.

261. On the basis of the Working Paper by Mr. McRae, which also offered a tentative analysis of the direction that the Study Group may wish to take, the Study Group began an exchange of views addressing three main questions namely: (a) whether in principle MFN

provisions were capable of applying to the dispute settlement provisions of bilateral investment treaties (BITs); (b) whether the conditions set out in BITs under which dispute settlement provisions may be invoked by investors were matters that affected the jurisdiction of a tribunal; (c) what factors were relevant in the interpretative process in determining whether an MFN provision in a BIT applied to the conditions for invoking dispute settlement.

262. The Study Group recognized that whether or not an MFN provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on each particular treaty, which had its own specificities to be taken into account. It was appreciated that there was no particular problem where the parties explicitly included or excluded the conditions for access to dispute settlement within the framework of their MFN provision. The question of interpretation had arisen, as in the majority of cases, when the MFN provisions in existing BITs were not explicit as to the inclusion or exclusion of dispute settlement clauses. It was suggested that at a minimum, there was no need for tribunals when interpreting MFN provisions in BITs to inquire into whether such provisions in principle would not be capable of applying to dispute settlement provisions. Post-*Maffezini*, it would be prudent for States to give an indication of their preference.

263. It was appreciated that investment tribunals, both explicitly and implicitly, consider that the question of the scope of MFN provisions in BITs is a matter of treaty interpretation. BITs are treaties governed by international law. Accordingly, the principles of treaty interpretation as set out in articles 31 to 33 of the Vienna Convention on the Law of Treaties are applicable to their interpretation.[339] The general rule of treaty interpretation as set out in article 31 of the Vienna Convention is that treaties "shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose."[340] In the context of its further work, the Study Group will continue to consider the various factors that have been taken into account by the tribunals in interpretation with a view to considering whether recommendations could be made in relation to: (a) the ambit of context; (b) the relevance of the content of the provision sought to be replaced; (c) the interpretation of the provision sought to be included; (d) the relevance of preparatory work; (e) the treaty practice of the parties; (f) the principle of contemporaneity. It was considered that it would be necessary to give further attention to aspects concerning interpretation of the MFN clause beyond *Maffezini*, whether additional light could be thrown on the distinction made in the case law between jurisdiction and admissibility, the question of who is entitled to invoke the MFN clause, whether a particular understanding could be given to "less favourable treatment" when such provision is invoked in the context of BITs, and whether there was any role for policy exceptions as a limitation on the application of the MFN clause.

264. The Study Group recalled that it had previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. These will be kept in view as the Study Group progresses in its work. It was also recalled that the relationship of the MFN clause and regional trade agreements was an area that was anticipated for further study. It was also suggested that there were other areas of contemporary interest such as the relationship between investment agreements and human rights. However, the Study Group was mindful of the need not to broaden the scope of its work, and was therefore cautious about exploring aspects that may

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[339] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

[340] Vienna Convention on the Law of Treaties, art. 31, para. 1.

divert attention from its work on areas that posed problems relating to the application of the provisions of the 1978 Draft articles.

265. The Study Group shared views on the broad outlines of its future report and generally viewed it important to provide, a general background to its work within the broader framework of general international law, in the light of subsequent developments, following the adoption of the 1978 Draft articles, to address contemporary issues concerning MFN clauses, analysing in that regard, such issues as the contemporary relevance of MFN provisions, the work on MFN provisions done by other bodies, and the different approaches taken in the interpretation of MFN provisions. It is also envisioned that the final report of the Study Group would address broadly the question of the interpretation of MFN provisions in investment agreements in respect of dispute settlement, analysing the various factors that are relevant to this process and presenting examples of model clauses for the negotiation of MFN provisions, based on State practice. The Study Group recognized that changes in the composition of the Commission had an impact in the progress of its work as certain aspects could not be undertaken intersessionally. It however remained optimistic that its work could be completed within the next two or three sessions of the Commission.

Chapter XII
Other decisions and conclusions of the Commission

A. Immunity of State officials from foreign criminal jurisdiction

266. At its 3132nd meeting, on 22 May 2012, the Commission decided to appoint Ms. Concepción Escobar Hernández as Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" to replace Mr. Roman A. Kolodkin.

B. Provisional application of treaties

267. At its 3132nd meeting, on 22 May 2012, the Commission also decided to include the topic "Provisional application of treaties" in its programme of work and decided to appoint Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic.

C. Formation and evidence of customary international law

268. At its 3132nd meeting, on 22 May 2012, the Commission further decided to include the topic "Formation and evidence of customary international law" in its programme of work and decided to appoint Mr. Michael Wood as Special Rapporteur for the topic.

D. Treaties over time

269. At its 3136th meeting, on 31 May 2012, the Commission decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

E. Programme, procedures and working methods of the Commission and its documentation

270. At its 3132nd meeting, on 22 May 2012, the Commission established a Planning Group for the current session.[341]

271. The Planning Group held four meetings. It had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session,[342] section G entitled "Other decisions and conclusions of the Commission"; General Assembly resolution 66/98 on the Report of the International Law Commission on the work of its sixty-third session, in particular paragraphs 22 to 28; and General Assembly

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[341] The Planning Group was composed of: Mr. B. Niehaus (Chairman); Members: Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. D.D. Tladi, Mr. E. Valencia-Ospina, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. P. Šturma (*ex officio*).

[342] A/CN.4/650 and Add.1.

resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels.

1. Working Group on the Long-term Programme of Work

272. At its 1st meeting, on 22 May 2012, the Planning Group decided to establish a Working Group on the Long-term Programme of Work for the present quinquennium, chaired by Mr. Donald M. McRae. The Chairman of the Working Group submitted an oral progress report to the Planning Group on 24 July 2012, noting, *inter alia*, that the Working Group had held four meetings during which it considered some possible topics.

2. Work programme of the Commission for the remainder of the quinquennium

273. The Commission recalled its decision in 2011 that the Group should cooperate with Special Rapporteurs and coordinators of Study Groups to define, at the beginning of any new topic, a tentative schedule for the development of the topic over a number of years as may be required, and periodically review the attainment of annual targets in such schedule, updating it when appropriate.[343] The Commission further recalled that it was customary at the beginning of each quinquennium to prepare the Commission's work programme for the remainder of the quinquennium setting out in general terms the anticipated goals in respect of each topic on the basis of indications by the Special Rapporteurs. It is the understanding of the Commission that the work programme has a tentative character since the nature and the complexities of the work preclude certainty in making predictions in advance.

Work programme (2013–2016)

(a) Expulsion of aliens

2013

Draft articles under consideration by States.

2014

Commencement of second reading of the draft articles by the Commission.

2015

Finalization and adoption of the draft articles on second reading by the Commission.

2016

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(b) Protection of persons in the event of disasters

2013

Sixth report: the pre-disaster phase.

2014

Seventh report: protection of relief personnel, use of terms, miscellaneous provisions, first reading, complete draft.

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[343] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 378.

2015

Comments of Governments on draft adopted on first reading.

2016

Eighth and final report: second reading, adoption of complete set of articles.

(c) Immunity of State officials from foreign criminal jurisdiction

2013

First substantive report to the Commission with draft articles; consideration and adoption of draft articles by the Drafting Committee.

2014

Second report with draft articles; consideration and adoption of draft articles by the Drafting Committee.

2015

Third report with draft articles; consideration and adoption of draft articles by the Drafting Committee.

2016

Fourth report with draft articles; consideration and adoption of draft articles by the Drafting Committee; adoption of draft articles on first reading by the Commission.

(d) Provisional application of treaties

2013

First report.

2014

Second report with draft articles/guidelines/model clauses.

2015

Third report with revised draft articles/guidelines/model clauses.

2016

Fourth report.

(e) Formation and evidence of customary international law

2013

First report: preliminary or background points/materials.

2014

Second report: State practice and *opinio juris*, with draft conclusions or guidelines.

2015

Third report: particular topics, such as the 'persistent objector', with draft conclusions or guidelines.

2016

Fourth report: revised consolidated set of conclusions or guidelines, for discussion and adoption.

(f) Subsequent agreements and subsequent practice in relation to the interpretation of treaties

2013

First report.

2014

Second report.

2015

Third report: provisional adoption of draft conclusions.

2016

Finalization of draft conclusions.

(g) Most-Favoured-Nation clause

2013

Presentation of a draft of a potential final report with additional research on specific topics.

2014

Revision of draft report and adoption with amendment or request for further amendments and research.

2015

Adoption of final report.

2016

…

(h) Obligation to extradite or prosecute (*aut dedere aut judicare*)

The Commission will determine during its sixty-fifth session whether to continue with the topic, and, if so, how.

3. Consideration of General Assembly resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels

274. The General Assembly, in resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission has commented annually on its role in promoting the rule of law since 2008. It notes that the substance of the comprehensive comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remains relevant and reiterates the comments in paragraph 231 of its 2009 report (A/64/10) as well as the comments in paragraphs 390 to 393 of its 2010 report (A/65/10), and paragraphs 392 to 398 of its 2011 report (A/66/10).

275. The Commission recalls that the rule of law constitutes the essence of the Commission, for its basic mission is to work for the progressive development and codification of international law, bearing in mind its implementation at the national level.

The Commission notes that the role of the General Assembly in encouraging the progressive development of international law and its codification is reaffirmed in General Assembly resolution 66/102 on the rule of law at the national and international levels.

276. The Commission recalls that as an organ established by the General Assembly and in keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, and in its Statute, it continues to promote the progressive development and codification of international law through its work. The work of the Commission has led to the adoption by States of a significant number of conventions. For such conventions to serve their full purpose they need to be ratified and implemented. In addition to formulating draft articles, the Commission's output takes other forms, which also contribute to the progressive development and codification of international law. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level. The Commission considers that its work to promote the progressive development and codification of international law demonstrates the manner in which the Commission aims at promoting the rule of law at the international level.

277. The Commission welcomes the decision of the General Assembly to declare the "Rule of law at the national and international levels" as the thematic subject for this year and to hold the 2012 high-level meeting.

278. Bearing in mind the close interrelation of the rule of law at the national and international levels, the Commission, in fulfilling its mandate of codification and progressive development, considers that its work should take into account, where appropriate, the principles of human rights that are fundamental to the international rule of law as reflected in the preamble and in Article 13 of the Charter of the United Nations. Accordingly, the Commission has promoted awareness of the rule of law at the national and international levels through its work on such topics as expulsion of aliens; protection of persons in the event of disasters; and immunity of State officials from foreign criminal jurisdiction.

279. The Commission reiterates its commitment to the rule of law in all of its activities.

4. Honoraria

280. The Commission reiterates once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which has been expressed in the previous reports of the Commission.[344] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

5. Documentation and publications

281. The Commission reiterated its recognition of the particular relevance and significant value of the legal publications prepared by the Secretariat to its work.[345] In particular, the

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[344] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525–531; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396, and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 399.

[345] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10),

Commission welcomed the publication of the eighth edition of the "*The Work of the International Law Commission*", a publication which provides a comprehensive, authoritative and up-to-date review of the Commission's contribution to the progressive development and codification of international law. The Commission noted, with appreciation, the Codification Division's intention to continue the practice of issuing new editions of the publication at the beginning of each quinquennium. In addition, the Secretariat was requested to make every effort to issue this publication in the other five official languages as soon as possible. The Commission also welcomed the publication of the 2010 volume of the *United Nations Juridical Yearbook*, as well as of a new edition of the *United Nations Legislative Series*, entitled "Materials on the Responsibility of States for Internationally Wrongful Acts". The Commission underlines the usefulness of the continuation of the publication of the *Legislative Series*. The Commission requested the Secretariat to continue to provide the Commission with such publications in hard copy format.

282. The Commission further noted with appreciation that the Codification Division was able to expedite significantly the issuance of these publications through the continuation and expansion of its desktop publishing initiative, which greatly enhanced the timeliness and relevance of these publications to the Commission's work.

283. The Commission recommends that, in its documents and publications, and particularly in the legal instruments it has adopted, including the versions appearing in the *Official Records of the General Assembly*, the United Nations editors adopt the style of commencing the first word of a subsidiary part of a sentence set as a subparagraph in lowercase, where the text is run on from the sentence.

284. The Commission welcomes the progress in the elimination of the backlog in the publication of the *Yearbook of the International Law Commission*. It commends the Publication, Editing and Proofreading Section for its efforts and encourages it to continue its valuable work in the preparation of this important publication.

285. The Commission expresses its gratitude to all services involved in the processing of documents, both in Geneva and in New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints, which contributes to the smooth conduct of the Commission's work.

286. The Commission wishes to express its appreciation to the United Nations Office at Geneva Library, which assists its members very efficiently and competently.

6. Trust fund on the backlog relating to the *Yearbook of the International Law Commission*

287. The Commission reiterated that the *Yearbooks* were critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission noted that the General Assembly, in its resolution 66/98, had expressed its appreciation to Governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to the fund.

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paras. 387–395.

7. Assistance of the Codification Division

288. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission. The Commission reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide the Commission with these publications.

8. Websites

289. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[346] The Commission reiterated that this website and other websites maintained by the Codification Division[347] constitute an invaluable resource for the Commission and for researchers on the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law as recalled in paragraph 412 of the 2011 Commission's Report (A/66/10). The Commission welcomed the fact that the website on the work of the Commission includes information on the current status of the topics on the agenda of the Commission, as well as advance edited versions of summary records of the Commission.

F. Date and place of the sixty-fifth session of the Commission

290. The Commission recommended that the sixty-fifth session of the Commission be held in Geneva from 6 May to 7 June and from 8 July to 9 August 2013.

G. Cooperation with other bodies

291. At its 3148th meeting, on 24 July 2012, Judge Peter Tomka, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it,[348] drawing special attention to aspects that have a particular relevance to the work of the Commission. An exchange of views followed.

292. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe were represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public international Law, Ms. Edwige Belliard, and the Director of Legal Advice and Public International Law of the Council of Europe, Mr. Manuel Lezertua, who addressed the Commission at its 3140th meeting, on 4 July 2012.[349] They focused on the current activities of CAHDI on a variety of legal matters, as well of the Council of Europe. An exchange of views followed.

293. The African Union Commission on International Law was represented at the present session of the Commission by Mr. Blaise Tchikaya and Mr. Minelik Alemu Getahun, who

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[346] Located at http://www.un.org/law/ilc/.

[347] Generally accessible through: http://www.un.org/law/lindex.htm.

[348] This statement is recorded in the summary record of that meeting.

[349] *Ibid.*

addressed the Commission at its 3146th meeting, on 17 July 2012.[350] They gave an overview of the activities of the African Union Commission on International Law. An exchange of views followed.

294. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. David P. Stewart, who addressed the Commission at its 3149th meeting, on 25 July 2012.[351] He gave an overview of the activities of the Committee as contained in its annual report. An exchange of views followed.

295. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Mr. Rahmat Mohamad, addressed the Commission at its 3150th meeting, on 26 July 2012. He briefed the Commission on the recent and forthcoming activities of AALCO. In particular, he reviewed the consideration given by AALCO to the work of the Commission. An exchange of views followed.

296. On 10 July 2012, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest, including an overview of the main priorities of the ICRC Legal Division and a presentation on the ICRC project on strengthening legal protection for victims of armed conflicts, as well as issues concerning "Protection of the environment in relation to armed conflicts".[352] An exchange of views followed.

H. Representation at the sixty-seventh session of the General Assembly

297. The Commission decided that it should be represented at the sixty-seventh session of the General Assembly by its Chairman, Mr. Lucius Caflisch.

298. At its 3158th meeting, on 3 August 2012, the Commission requested Mr. Maurice Kamto, Special Rapporteur on the topic "Expulsion of aliens", to attend the sixty-seventh session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.

299. The Commission wishes that the former Special Rapporteur on the topic "Reservations to treaties", Mr. Alain Pellet, be invited by the Sixth Committee of the General Assembly in order to attend the debate in the Sixth Committee on the chapter of the 2011 report of the Commission which relates to this topic.[353]

I. Tribute to the Secretary of the Commission

300. At its 3158th meeting, on 3 August 2012, the Commission paid tribute to Mr. Václav Mikulka, who has acted with high distinction as Secretary of the Commission since 1999, and who will retire after the present session; expressed its gratitude for the outstanding contribution made by him to the work of the Commission and to the

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[350] *Ibid.*

[351] *Ibid.*

[352] Ms. Jelena Pejic, Legal Adviser of the ICRC, gave an overview of the joint ICRC/Swiss initiative on strengthening IHL compliance mechanisms and Mr. Ramin Mahnad gave a presentation on the ICRC project on strengthening legal protection for persons deprived of their liberty in non-international armed conflicts. Ms. Marie G. Jacobsson gave an overview of the topic "Protection of the environment in relation to armed conflicts", which is in the long-term programme of work of the Commission.

[353] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10*, A/66/10 (chap. IV) and A/66/10/Add.1.

codification and progressive development of international law; acknowledged with appreciation his professionalism, dedication to public service and commitment to international law; and extended its very best wishes to him in his future endeavours.

J. International Law Seminar

301. Pursuant to General Assembly resolution 66/98, the forty-eighth session of the International Law Seminar was held at the Palais des Nations from 2 to 20 July 2012, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service of their country.

302. Twenty-four participants of different nationalities, from all the regions of the world, took part in the session.[354] The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

303. The Seminar was opened by Mr. Lucius Caflisch, Chairman of the Commission. Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar. The scientific coordination of the Seminar was ensured by the University of Geneva. Mr. Vittorio Mainetti, from the University of Geneva, acted as coordinator, assisted by Mr. Martin Denis, legal assistant.

304. The following lectures were given by members of the Commission: Mr. Ernest Petrič: "*The Work of the International Law Commission*"; Ms. Concepción Escobar Hernandez: "*Immunity of State Officials from Foreign Criminal Jurisdiction*"; Mr. Georg Nolte: "*Treaties over Time*"; Mr. Donald. M. McRae: "*The Most-Favoured Nation Clause*"; Mr. Shinya Murase: "*The Protection of Atmosphere in International Law: Rationale for Codification*"; and Mr. Maurice Kamto: "*Expulsion of Aliens*".

305. Lectures were also given by Mr. Eric Tistounet, Chief of the Human Rights Council Branch of the Office of the High Commissioner for Human Rights: "*The Revision of the Mechanisms of the Human Rights Council: An Assessment*"; and by Ms. Jelena Pejic, Legal Adviser in the Legal Division of the International Committee of the Red Cross: "*Current Challenges to International Humanitarian Law*".

306. Two special external sessions were organized in the premises of the University of Geneva and of the Graduate Institute of International and Development Studies of Geneva (HEID). At the University of Geneva, seminar participants attended a "Brainstorming session" on the topic: "*The Environment in Relation to Armed Conflict*". The session was

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[354] The following persons participated in the forty-eighth session of the International Law Seminar: Ms. Adejumoke Adegbonmire (Nigeria), Ms. Mariam Al-Hail (Qatar), Ms. Alma Amézquita Manzano (Mexico), Mr. Michel-Ange Bontemps (Haiti), Mr. Sékou Camara (Guinea), Ms. Xiaohua Chen (China), Ms. Rhia Rilina Chowdhury (India), Ms. Carolina Claro (Brazil), Ms. Yolande Dwarika (South Africa), Ms. Desislava Gosteva (Bulgaria), Ms. Eugenia Gutiérrez-Ruiz (Costa Rica), Ms. Sara Ianovitz (Italy), Mr. Levon Isakhanyan (Georgia), Ms. Yuriko Kuga (Japan), Mr. Thushara Kumarage (Sri Lanka), Mr. Marco Mollar (Argentina), Mr. Josel Mostajo (Philippines), Ms. Michaela Rišova (Slovakia), Mr. Abderrezak Seghiri (Algeria), Mr. Regis Simo (Cameroon), Ms. Kate Smyth (Australia), Ms. Lucia Solano Ramirez (Colombia), Ms. Alexia Solomou (Cyprus), and Mr. Tesfagabir Teweldebirhan Kibrom (Eritrea).The Selection Committee, chaired by Ms. Laurence Boisson de Chazournes, Professor of International Law and International Organizations at the University of Geneva, met on 26 April 2012 at the Palais des Nations and selected 25 candidates out of 94 applications for participation in the Seminar. At the last minute, one selected candidate could not attend the seminar.

followed by a reception offered by the University of Geneva. At the HEID, seminar participants attended a session on "*The Protection of Atmosphere in International Law*".

307. Seminar participants had the opportunity to familiarize themselves with the work of other international organizations based in Geneva. The participants also attended a session of the Human Rights Committee and a side-event organized at the World Intellectual Property Organisation on the topic: "*Intellectual Property and Safeguarding of Intangible Cultural Heritage: Understanding the International Legal Landscape*". Finally, a visit of the European Organization for Nuclear Research (CERN) was organized.

308. Three Seminar working groups on "*Crimes against Humanity as a Possible Topic for Codification*", "*Protection of Persons in the Event of Disasters*" and "*Immunity of State Officials from Foreign Criminal Jurisdiction*" were organized. Each Seminar participant was assigned to one of them. Three members of the Commission, Ms. Concepción Escobar Hernandez, Mr. Sean D. Murphy and Mr. Eduardo Valencia Ospina supervised and provided expert guidance to the working groups. Each group prepared a report and presented its findings to the Seminar in a special session. The reports were compiled and distributed to all participants as well as to the members of the Commission.

309. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided tour of the Hôtel de Ville and the Alabama room, followed by a reception.

310. Mr. Lucius Caflisch, Chairman of the International Law Commission, Mr. Markus Schmidt, Director of the Seminar, and Ms. Mariam Al-Hail (Qatar), on behalf of the participants of the seminar, addressed the Commission and the participants during the closing ceremony of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-eighth session of the Seminar.

311. The Commission noted with particular appreciation that, since 2010, the Governments of Austria, China, Finland, India, Ireland, Sweden and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving candidates, especially from developing countries, in order to achieve adequate geographical distribution of participants. This year, fellowships (travel and subsistence allowance) were awarded to 15 candidates.

312. Since 1965, the year of the Seminar's inception, 1,093 participants, representing 170 nationalities, have taken part in the Seminar. Of them, 669 have received a fellowship.

313. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many International Organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2013 with as broad participation as possible.

314. The Commission noted with satisfaction that, in 2012, comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided at the next session of 2013, within existing resources.

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